No. 91-1306-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Guy W. Olano, Jr., and Raymond M. Gray

Docketed:
February 11, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Joffe,Andrew, Genego,William J., McLeod,Sheryl Gordon, Olana,Guy W., Gray,Raymond M., Phillips,Carter G.

Time to file ext by J. O'Connor to & inc Feb. 15, 1992 CITED

Entry	Date	Note	Proceedings and Orders
1	Jan 7 1992		Application for extension of time to file petition and order granting same until February 15, 1992 (O'Connor, January 7, 1992).
2	Feb 11 1992	G	Petition for writ of certiorari filed.
4	Mar 10 1992		Order extending time to file response to petition until April 15, 1992.
7	Apr 1 1992		Brief of respondent Guy Olano in opposition filed.
8	Apr 1 1992	G	Motion of respondent Guy W. Olano, Jr. for leave to proceed in forma pauperis filed.
9	Apr 1 1992		* Form 4 affidavit of indigency of respondent Olano Jr. in route
5	Apr 15 1992		DISTRIBUTED. May 15, 1992
6	Apr 15 1992	X	Brief of respondent Raymond M. Gray in opposition filed.
10	Apr 28 1992	X	Reply brief of petitioner United States filed.
11	May 1 1992		Form 4 Affidavit of Indigency filed and distributed.
12	May 18 1992		Motion of respondent Guy W. Olano, Jr. for leave to proceed in forma pauperis GRANTED.
13	May 18 1992		Petition GRANTED.
			**********
16	Jun 29 1992		Record filed.
		*	Original proceedings U. S. District Court, Western District of Washington (7 BOXES)
15	Jul 1 1992		Record filed.
		*	Partial proceedings and briefs U. S. Court of Appeals for the Ninth Circuit. (Box)
14	Jul 2 1992		Brief of petitioner United States filed.
17	Jul 13 1992		Joint appendix filed.
18	Jul 24 1992	G	Motion of respondent Guy W. Olano, Jr. for appointment of counsel filed.
20	Aug 7 1992		Order extending time to file brief of respondent on the merits until August 31, 1992.
21	Aug 25 1992		Order further extending time to file brief of respondent on the merits to and including September 10, 1992. This extension is granted for both respondents.
22	Sep 10 1992		Brief of respondent Raymond M. Gray filed.
23	Sep 10 1992	G	Motion of the Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice

Entry	Date	Note	Proceedings and Orders
			filed.
24	Sep 10 1992		Brief of respondent Guy W. Olano, Jr. filed.
25	Oct 5 1992		Motion for appointment of counsel GRANTED and it is ordered that Carter G. Phillips, Esquire, of Washington, D. C., is appointed to serve as counsel for the respondent Guy W. Olano, Jr. in this case.
26	Oct 5 1992		Motion of the Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice GRANTED.
27	Oct 13 1992		SET FOR ARGUMENT WEDNESDAY, DECEMBER 9, 1992. (1ST CASE)
28	Oct 15 1992		CIRCULATED.
29	Oct 22 1992	X	Reply brief of petitioner filed.
30	Dec 9 1992		ARGUED.

91-1306

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., and RAYMOND M. GRAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

ANDREW LEVCHUK
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether allowing alternate jurors to be present during jury deliberations is automatic reversible error, even when the defense consents to that procedure.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., and RAYMOND M. GRAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 934 F.2d 1425.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 34a-35a) was entered on May 31, 1991. A petition for rehearing was denied on October 18, 1991. App., *infra*, 33a. On January 7, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 24(c) provides:

> **Alternate Jurors.** The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

STATEMENT

1. Following a three-month trial in the United States District Court for the Western District of Washington, a jury convicted respondents of conspiracy to defraud several thrift institutions, in violation of 18 U.S.C. 371; willful misapplication of federally insured funds by a bank officer, in violation of 18 U.S.C. 657; making false statements in connection with a federally insured lending institution, in violation of 18 U.S.C. 1006; and interstate transportation of stolen money, in violation of 18 U.S.C. 2314. Respondent Gray was also convicted of wire fraud, in violation of 18 U.S.C. 1343, and respondent Olano was also convicted of making a false statement on a loan document, in violation of 18 U.S.C. 1014. Respondents were each sentenced to 15 years' imprisonment, to be followed by five years' probation, and were ordered to pay restitution. App., *infra*, 2a, 4a-5a.

The evidence at trial showed that Olano was the chairman of Alliance Federal Savings and Loan Association in Kenner, Louisiana. Gray was the chairman of Home Savings and Loan Association in Seattle, Washington. Along with several co-defendants, Gray and Olano engaged in an elaborate scheme to defraud the savings and loan institutions they controlled by making a series of unauthorized loans and fraudulent extensions of credit, and by paying kickbacks from loan proceeds. App., *infra*, 3a-4a.

At the end of trial, the district court suggested that the two alternate jurors be allowed to remain with the jury during deliberations. The court said:

> [I]t's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just to sit in on deliberations.
>
> It's strictly a matter of courtesy and I know many judges have done it with no objection from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

App., *infra*, 5a n.5; Tr. 10,400.

Initially, counsel for Olano objected to the district court's suggestion. Later, before the case went to the jury, the district court noted that defense counsel had agreed that the two alternates could go to the jury room with the jury. Counsel for one of the co-defendants stated: "It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations." App., *infra*, 6a. After charging the jury, the district court instructed the alternates not to participate in the deliberations and sent them into the jury room. One of the alternates asked to be excused, and the district court granted the request. The other remained with the jury until it reached a verdict. *Id.* at 7a n.7.

2. The court of appeals reversed. App., *infra*, 1a-32a. The court held that Fed. R. Crim. P. 24(c) requires the district court to discharge the alternates when the jury retires to deliberate. The court observed that the Advisory Committee on the Criminal Rules had considered and rejected a proposal to send alternates into the jury room with instructions not to participate in the deliberations. Consequently, the court concluded, the district court's failure to discharge the alternates at the outset of deliberations violated Rule 24(c). The court of appeals further concluded that defendants can waive their objections to a violation of Rule 24(c), but only if the defendants themselves, rather than their counsel, personally consent on the record to the procedure. Because "[n]othing in the record suggests that [respondents] intelligently and knowingly consented personally to a waiver of their rights under the Rule," the court held that there was no waiver in this case. App., *infra*, 27a-28a.

The court recognized that, because respondents did not object to sending the alternates into the jury room, the district court's action was subject to reversal only for plain error. App., *infra*, 22a-23a. The court of appeals held that permitting alternates to be present during deliberations is plain error because it "inherently" prejudices defendants by "infring[ing] upon the jury's privacy and the secrecy of the jury process." *Id.* at 28a. The court said that it could not determine whether the alternates had obeyed the district court's instruction not to participate in the deliberations. And even if the alternates attempted to follow the court's instructions, their "attitude[s], conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *Ibid.* (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)). The court of appeals concluded that "[a]bsent a valid personal waiver by the defendants, allowing alternate jurors to be present during jury deliberations constitutes a violation of Rule 24(c) and requires a reversal of the verdict." App., *infra*, 30a. Although only Olano raised the issue on appeal, the court applied its ruling to Gray as well to avoid a "manifest injustice." *Id.* at 30a-31a.[1]

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[1] The court of appeals also held that there was insufficient evidence to support respondents' convictions under 18 U.S.C. 1014. App., *infra*, 13a-17a, 18a-20a. The government does not seek further review of that portion of the court of appeals' decision.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that a violation of Fed. R. Crim. P. Rule 24(c) is plain error that requires reversal in the absence of a personal waiver by the defendant. The court of appeals' decision conflicts with decisions of other courts of appeals holding that violations of Rule 24(c) do not require reversal of a criminal conviction absent a showing of prejudice. The decision is also inconsistent with decisions of this Court recognizing that very few trial errors should result in reversal of convictions absent a showing of prejudice to the defendant. Finally, the court of appeals' decision is inconsistent with the well-settled principle that defendants cannot obtain reversal of their convictions based on claims of procedural irregularity to which their counsel have consented. The court's ruling that the consent of counsel was not sufficient, and that the personal consent of respondents themselves was required, conflicts with the repeated admonitions of this Court that counsel are ordinarily understood to speak for their clients, and that it is only on such fundamental matters as the decision to waive counsel or the decision to plead guilty that the court must obtain the defendant's personal consent before it may take action, rather than relying on the representations of counsel.

As a result of the court of appeals' erroneous decision, the government will be required to repeat a lengthy and complex trial because of a technical error that did not infringe any constitutional or other substantial right of the defendants. The Court should grant certiorari to resolve the conflict in the circuits and to correct the court of appeals' error in this important prosecution.

1. As an initial matter, the court of appeals correctly held that allowing alternate jurors to be present during jury deliberations violates Fed. R. Crim. P. 24(c). Rule 24(c) provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." By its plain terms, Rule 24(c) requires the district court to discharge alternate jurors when the jury retires to begin its deliberations. In light of the mandatory language of the Rule, we agree with the court of appeals that the district court erred in allowing the alternate jurors to be present during the jury's deliberations. We disagree, however, with the court of appeals' conclusion that the district court's error requires that respondents' convictions be reversed.

2. There is a conflict among the circuits on the question whether a violation of Rule 24(c) is reversible error per se. The court of appeals' decision in this case conflicts with decisions of other courts of appeals, which have held that "a violation of Rule 24(c) does not require reversal *per se* absent a showing of prejudice." *United States* v. *Reed*, 790 F.2d 208, 210 (2d Cir.), cert. denied, 479 U.S. 954 (1986). In *Reed*, the district court erroneously permitted an alternate juror to participate in the jury's deliberations and to cast a vote for conviction. The Second Circuit nevertheless affirmed the conviction because it concluded that "[i]t would be difficult to see how [the defendant] would be prejudiced by the use of a jury of thirteen instead of twelve," and because it found nothing to indicate that the defendant had been prejudiced. 790 F.2d at 210 (quoting *State* v. *Cuzick*, 530 P.2d 288, 289 (Wash. 1975). See also *United States* v. *Jones*, 763 F.2d 518, 523 (2d Cir.), cert. denied, 474 U.S. 981 (1985). Similarly, in *United*

States v. *Kaminski*, 692 F.2d 505 (8th Cir. 1982), the district court erroneously allowed an alternate juror to sit with the jury during its deliberations, and it later substituted the alternate for one of the regular jurors. The Eighth Circuit held that a violation of Rule 24(c) requires reversal "only where there is some showing of prejudice," and concluded that no such showing had been made. *Id.* at 518.

The Fifth, Eleventh, and District of Columbia Circuits have reached the same conclusion. In *United States* v. *Watson*, 669 F.2d 1374 (11th Cir. 1982), an alternate juror was inadvertently permitted to retire with the jury. Before the district court discovered its mistake, the jury elected the alternate as its foreman. The district court subsequently discharged the alternate and instructed the remaining jurors to disregard any prior deliberations. On appeal, the Eleventh Circuit rejected a rule of "automatic reversal" and instead remanded the case to allow the district court to determine whether the presence of the alternate juror had affected the jury's verdict. *Id.* at 1391-1392.

Likewise, in *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), the Fifth Circuit held that a district court's refusal, over defense counsel's objection, to dismiss an alternate juror when the jury retired to deliberate, and its subsequent replacement of a member of the jury with the alternate, was not reversible error. The court stated that it "does not apply a per se rule of reversal to Rule 24(c) violations," and it found no evidence that the procedure had prejudiced the defendants. *Id.* at 994.

Finally, in *United States.* v. *Sobamowo*, 892 F.2d 90, 95-96 (D.C. Cir. 1989), cert. denied, 111 S. Ct. 78 (1990), the District of Columbia Circuit held that a

violation of Rule 24(c) does not require reversal absent a showing of prejudice. Because there was no indication that the defendant was prejudiced the court held that reversal was not required.[2]

Although five circuits have rejected, explicitly or implicitly, a rule of automatic reversal, two other courts of appeals have agreed with the Ninth Circuit that violations of Rule 24(c) are reversible error per se. See *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964); *United States* v. *Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) ("*Virginia Erection* * * * establishes a *per se* rule of plain error"); *United States* v. *Beasley*, 464 F.2d 468, 469 (10th Cir. 1972) ("inclusion of the alternate in *any* proceeding commenced by the jury itself after it retires to deliberate is ground for a mistrial"). Thus, there is a clear conflict among the courts of appeals as to whether violations of Rule 24(c) are automatic reversible error.

3. The decision of the court of appeals is at odds with decisions of this Court holding that there are very few errors that should result in automatic reversal of a criminal conviction absent a showing of prejudice to the defendant. See, *e.g.*, *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263-1266 (1991) (opinion of Rehnquist, C.J., collecting cases); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988) (district court may not dismiss an indictment for prosecutorial misconduct that does not prejudice the defendant); *United States* v. *Lane*, 474 U.S. 438, 446

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[2] See also *Johnson* v. *Duckworth*, 650 F.2d 122. (7th Cir.) (Constitution does not forbid States from allowing alternate jurors to be present during jury deliberations over the defendant's objection), cert. denied, 454 U.S. 867 (1981).

(1986) (misjoinder under Fed. R. Crim. P. 8(b) is subject to harmless error analysis); *Rushen* v. *Spain*, 464 U.S. 114, 118-119 (1983) (rejecting rule that unrecorded *ex parte* communications between trial judge and juror can never be harmless error). The principle for which these cases stand is that error in the course of a criminal trial does not call for automatic reversal unless the error constitutes a "structural defect affecting the framework within which the trial proceeds," such as the total deprivation of the right to counsel or the denial of an impartial judge or factfinder. *Arizona* v. *Fulminante*, 111 S. Ct. at 1265 (opinion of Rehnquist, C.J.).

In concluding that a violation of Rule 24(c) is "inherently prejudicial" and "infringes upon a substantial right of the defendants," App., *infra*, 28a, 30a n.23, the court of appeals relied on the Fourth Circuit's decision in *United States* v. *Virginia Erection Corp.*, *supra*. See App., *infra*, 28a-29a. *Virginia Erection Corp.*, in turn, rests on the view that the " 'trial by jury' contemplated by Article III, Section 2, [Cl. 3] and the Sixth Amendment is a trial by a jury of twelve persons, *neither more nor less*." 335 F.2d at 870. See also *id.* at 871 ("Twelve is the magic number."). But the constitutional right to trial by jury does not encompass a right to trial by a jury of exactly 12 persons. Consequently, even if the alternate jurors had participated in the deliberations in this case, there would be no basis for the court of appeals' conclusion that respondents were deprived of a constitutional or other substantial right.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court rejected the contention that the constitutional guarantee of a trial by jury necessarily requires a trial by exactly 12 persons. The Court concluded that "the fact that the jury at common law was composed

of precisely 12 is a historical accident unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics' " *Id.* at 102 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). The Court recognized that the purpose of a jury "is to prevent oppression by the Government." 399 U.S. at 100. See also *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975); *Duncan* v. *Louisiana*, 391 U.S. at 156. The Court reasoned that "[t]he performance of this role is not a function of the particular number of the body that makes up the jury." 399 U.S. 100.

To be sure, the Court recognized in *Williams* that the number of jurors "should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100. In subsequent cases, the Court established constitutional limits on the *minimum* size of a jury. See *Johnson* v. *Louisiana*, 406 U.S. 356 (1972) (9-3 verdict constitutional); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (10-2 verdict constitutional); *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (5-1 verdict unconstitutional); *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (5-0 verdict unconstitutional). But the Court has never suggested that the Constitution imposes a limit on the *maximum* size of juries. Certainly there is no support for the proposition that a 13-member or 14-member jury would violate any constitutional right of the defendant.

Indeed, the Court's jury-size decisions provide support for the proposition that a defendant is likely to benefit, not suffer, from an enlarged jury. The Court has recognized that the risk of an erroneous conviction decreases as the size of the jury increases. See

e.g., *Johnson* v. *Louisiana*, 406 U.S. at 362 ("Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors."); *Ballew* v. *Georgia*, 435 U.S. at 234 ("Statistical studies suggest that the risk of convicting an innocent person * * * rises as the size of the jury diminishes."). Because, as common sense suggests, the likelihood of a unanimous verdict decreases as the number of jurors increases, the risk of conviction—whether erroneous or not—decreases as the jury expands. It follows that there is no basis for the court of appeals' conclusion that allowing alternates to be present during jury deliberations is inherently prejudicial to defendants.

That conclusion is reinforced by the fact that defense counsel consented to allow the alternates to sit in on the deliberations. It is unlikely that experienced defense counsel would consent to a procedure that is "inherently prejudicial" to their clients. On the contrary, defense counsel's consent indicates that the defense either favored the procedure employed at trial, or did not regard the matter to be of sufficient moment to warrant an objection. Defense counsel presumably concluded that their clients were likely to benefit, or at least would not be harmed, by sending the alternates into the jury room.

The court of appeals stated that the presence of alternates during deliberations is inherently prejudicial because it "infringes upon the jury's privacy and the secrecy of the jury process." App., *infra*, 28a. That suggestion is unpersuasive. The reason for protecting the privacy and secrecy of the jury process is the danger that "[f]reedom of debate might be stifled and independence of thought checked

if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States*, 289 U.S. 1, 13 (1933). That danger is not presented by the presence, or even the participation, of alternate jurors. Alternate jurors are subject to the same selection procedures as regular jurors. They hear the same evidence as the regular jurors, as well as the same arguments of counsel and instructions from the court. As the Seventh Circuit has stated, "the alternate who accompanies the regular jurors into deliberations has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror." *Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), cert. denied, 454 U.S. 867 (1981). Consequently, there is no reason to believe that the mere presence of alternates in the jury room somehow taints the integrity of the jury's deliberative process to the "inherent prejudice" of the defendants.

4. Respondents failed to object to sending the alternates into the jury room. Consequently, the court of appeals was correct in stating, App., *infra*, 22a-23a, that the district court's action is reviewable only for plain error. See Fed. R. Crim. P. 52(b). The court of appeals was wrong, however, in finding the error in this case to be "plain."

The plain error rule "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). It should be invoked "to correct only 'particularly egregious errors,' those that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,'" and would result in a "miscarriage of justice." *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted).

The violation of Rule 24(c) in this case did not approach the level of plain error. No constitutional or other substantial right of the respondents was infringed. And there is no indication the respondents were prejudiced in any way, let alone that the violation affected the integrity of the trial or resulted in a miscarriage of justice. The court of appeals erred in elevating a technical violation of the Rules of Criminal Procedure to the level of plain error.

Moreover, respondents did not simply fail to object to allowing the alternates to remain with the regular jurors during deliberations; through counsel, they affirmatively consented to that procedure.[3] Thus, this case is governed by the "invited error" doctrine. Under that doctrine, a defendant who requests or expressly agrees to a particular procedure forfeits the right to claim on appeal that the district court erred in using that procedure, even more conclusively than does a defendant who merely fails to object.

The rationale behind imposing an especially stringent standard for review of invited errors is that where a party has expressly agreed to a particular course of action, the court and the opposing party should be entitled to assume that any possible objection to that course of action has been abandoned. In such circumstances, it is clear that the defense has adverted to the issue and made a tactical choice with respect to it. Absent the most extreme circumstances,

[3] The court of appeals noted that specific consent to having the alternates retire with the jury at the time of deliberations was given by counsel for one of respondents' co-defendants. The court of appeals assumed, *arguendo*, "that co-defendant's counsel spoke as counsel for all defendants on this issue," App., *infra*, 27a, but nonetheless held that consent insufficient since it did not constitute the personal consent of each defendant.

the defendant should be held to that choice. See, *e.g.*, *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 & n.2 (8th Cir. 1990) (defendant could not challenge jury instruction he had requested); *United States* v. *Prince*, 883 F.2d 953, 961-962 (11th Cir. 1989) (defendant could not challenge admission of hearsay elicited on cross-examination, where that questioning resulted from his direct examination); *United States* v. *Vachon*, 869 F.2d 653, 658-659 (1st Cir. 1989) (defendant could not complain about admission of evidence where he elicited inadmissible testimony); *United States* v. *Rodriguez-Cardenas*, 866 F.2d 390, 395-396 (11th Cir. 1989) (defendants could not question absence of limiting instruction where "they made a strategic decision" at trial not to request one), cert. denied, 493 U.S. 1069 (1990); *United States* v. *Oppon*, 863 F.2d 141, 145-146 & n.9 (1st Cir. 1988) (defendant could not challenge evidence he elicited at trial without objection).

The court of appeals sought to avoid this analysis by concluding that acquiescence by defense counsel was not enough. In order to forfeit the Rule 24(c) claim, the court of appeals held, the defendants had to consent to the procedure personally. But there is no sound basis for that holding. This Court has recognized that, as a constitutional matter, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury, and that the personal consent of the defendant is required before those rights will be deemed waived. See *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring). Nonetheless, the requirement of personal, informed consent by the defendant as a precondition to the ef-

fective waiver of trial rights is very much the exception rather than the rule, and the exceptions all involve decisions that have sweeping implications for the litigation.

With respect to most rights of the defendant in the criminal justice process, the defendant's attorney is authorized to make tactical decisions that result in forfeiture of those rights without the need to obtain an on-the-record recital of the defendant's personal and informed consent. As this Court has explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function if every tactical decision required client approval.

Taylor v. *Illinois*, 484 U.S. 400, 417-418 (1988) (footnote omitted). "Under our adversary system," the Court has stated, "once the defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 612 (1976); see *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Faretta* v. *California*, 422 U.S. 806, 820 (1975) ("when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas").

The decision to permit alternate jurors to retire with the regular jurors during deliberations is not

the sort of "fundamental" trial decision that the defendant must make personally. Compare *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (defendant can forfeit, without personal consent, the right not to have members of the venire excluded because of their attitudes toward capital punishment). The ruling of the court of appeals was therefore clearly at odds with this Court's decisions regarding counsel's authority to speak for the defendant. Review of the court's decision is warranted on that ground, as well as to resolve the conflict among the circuits on whether Rule 24(c) requires automatic reversal of a defendant's conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

ANDREW LEVCHUK
Attorney

FEBRUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Nos. 87-3128, 88-3096 and 88-3295

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

GUY W. OLANO, JR.,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

RAYMOND M. GRAY,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Washington

Submitted on the Briefs as to
No. 87-3128 *

Argued and Submitted as to Nos. 88-3096
and 88-3295 March 5, 1990

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* The panel unanimously finds No. 87-3128 suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

Submission Vacated March 7, 1990
Resubmitted Nov. 19, 1990
Decided May 31, 1991

Before WRIGHT, REINHARDT and O'SCANNLAIN, Circuit Judges.

REINHARDT, Circuit Judge:

Appellants Olano and Gray appeal their convictions for participating in an elaborate "kickback" scheme involving loans between and among various officers and directors of savings and loan institutions.[1] At trial, the government asserted that Gray and Olano, along with several co-conspirators, including Davy Hilling and David Neubauer,[2] defrauded three thrift institutions by using their positions as directors and officers of their respective institutions to make unauthorized and unsound loans and to grant extensions of credit to each other in exchange for reciprocal loans, extensions of credit, or kickbacks

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[1] Specifically, Gray was convicted of conspiracy, wire fraud, transportation of stolen money, misapplication of funds, and false bank transactions, in violation of 18 U.S.C. §§ 371, 657, 1006, 1343 and 2314. Olano was convicted of conspiracy, aiding and abetting Gray in willfully misapplying funds, causing a false financial statement to be made, and transportation of stolen money, in violation of 18 U.S.C. §§ 371, 657, 1006, 1014.

[2] The initial indictment charged Gray, Olano, Hilling, Neubauer, Joseph S. Ascani, Stewart P. Kalterman, Zaki S. Mansour, Brian G. Marler, and Jerome E. McCuin together. The district court granted Mansour's and McCuin's severance motion. The remaining defendants were charged in a superseding indictment. Ascani, Kalterman, and Marler were acquitted of all charges.

from the loan proceeds. Gray and Olano claim, *inter alia*, that there is insufficient evidence to sustain their convictions on certain counts. With respect to counts V, VI, and VII against Gray and counts VI and VIII against Olano, we find the evidence insufficient and therefore reverse the appellants' convictions. We reject Gray's contention that the evidence was insufficient as to counts III and IV, and likewise find the evidence sufficient to sustain Olano's convictions on counts III and IX. However, Olano and Gray also assert that the district court violated their right to a jury of twelve persons in allowing the two alternate jurors to retire to the jury room and remain there during jury deliberations. We agree and vacate the convictions of both appellants on all counts not reversed for insufficiency of evidence and remand for a new trial on those counts.[3]

I. Facts and Procedural History

Throughout the alleged conspiracy, defendants Hilling, Neubauer, Gray, and Olano each had effective control over three savings and loan institutions: Hilling was chairman of the board of directors of Irving Savings Association in Irving, Texas; Neubauer was operations manager of I.C.R. Mortgage Bankers, Inc., a wholly-owned subsidiary of Irving

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[3] Appellants raise other substantial issues, including the applicability of the rule set forth in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) and *United States v. Hilling*, 863 F.2d 677 (9th Cir. 1988) to the jury instructions given in this case. The appellants also challenge the district court's decision to conduct the trial on one afternoon in the absence of a juror. In view of the conclusion we reach with respect to the Rule 24(c) violation, it is unnecessary for us to address those issues.

Savings; Gray was chairman of the board of directors of Home Savings and Loan Association in Seattle, Washington; and Olano was chairman of the board of directors of Alliance Federal Savings and Loan Association in Kenner, Louisiana. These four defendants allegedly caused their respective institutions to transfer millions of dollars to each other by issuing loans and letters of credit. The government contends that, in carrying out the scheme, the defendants frequently bypassed generally-accepted procedural and record-keeping practices, such as documenting the issuance of letters of credit, requiring collateral, and ensuring that the institutions' financial obligations were adequately underwritten.

On December 8, 1986, Gray and Olano were charged in a multi-count indictment in connection with the alleged kickback scheme. Gray was charged in eight of the counts and Olano in seven. Both appellants were charged with conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371 (count I); wire fraud, in violation of 18 U.S.C. § 1343 (count II); interstate transportation of stolen property, in violation of 18 U.S.C. § 2314 (count III); misapplication of funds, in violation of 18 U.S.C. § 657 (count IV); false statements, in violation of 18 U.S.C. § 1006 (count VI and VIII). Gray was charged separately on two additional counts of violating § 1006 (counts V and VII). Olano was charged separately with submitting false loan documents for the purpose of influencing Home Savings, in violation of 18 U.S.C. § 1014 (count IX).

After approximately three months of trial, the jury, along with two alternate jurors, retired for deliberations. The jury found Gray guilty of all counts in which he was charged (counts I-VIII).

Olano was found not guilty of count II, but was convicted on the remaining counts in which he was charged (counts I, III-VI, VIII, and IX). Gray and Olano were sentenced to a series of three consecutive five-year terms and were ordered to make full restitution to the financial institutions.[4] Gray and Olano were also sentenced to five years probation commencing upon their release from custody.

On May 26, 1987, before the conclusion of trial, the district judge suggested that the two alternate jurors be allowed to remain with the jury during deliberations, unless the parties had an objection.[5] The following day, the court asked defense counsel "whether you want the alternates to go in and not participate." Olano's counsel responded, "We would ask that they not." No more discussion took place that evening.

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[4] Failing to appear for sentencing, Gray was indicted for and convicted of violating 18 U.S.C. §§ 3146(a) and (b). The district court imposed a five-year probation sentence for his conviction on this count. We affirmed, but remanded for resentencing, since the sentence was based on erroneous information. *See United States v. Gray*, 876 F.2d 1411 (9th Cir. 1989).

[5] The district judge explained:

> It's strictly a matter of courtesy and I know many judges have done it with no objection from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

However, on May 28, just before the prosecution's rebuttal argument, the following colloquy took place:

> THE COURT: Do I understand that the defendants now—it's hard to keep up with you, counsel. This is sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?
>
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
>
> MR. KELLOGG [counsel for co-defendant Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

While it appears that Kellogg spoke on behalf of all defense counsel, Olano's and Gray's counsel did not expressly consent. More important, the record does not show express personal consent from either defendant; nor does it reflect that either defendant understood what was being waived. Indeed, Olano claims that he was not even present for this colloquy because he (unlike the other defendants) was incarcerated at the time and the marshals had not yet returned him to the courtroom after the lunch recess.[6]

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[6] Although the record does not indicate whether or not Olano was present for the colloquy, his assertion that he was absent finds some support in the record. Olano cites an earlier portion of the Reporter's Transcript in which the court expressed dissatisfaction with the marshal's tardiness in returning him to court. The government now contends that Olano must have been present for the colloquy, since the court reporter would have undoubtedly noted the unexpected absence of Olano from the proceedings. However, the passage cited by Olano tells us that he was *sometimes* late in returning, but the government fails to cite a single instance in which the transcript reflects that fact.

Informing the jury of the procedural modification, the district judge stated:

> [S]ince the law requires that there be a jury of twelve, it is only going to be a jury of twelve. But what we would like to do in this case is have all [fourteen] of you go back so that even the alternates can be there for the deliberations, but according to law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate.

The alternate jurors then retired with the jury, which began its deliberations.[7]

II. Analysis

A. Sufficiency of the Evidence

Gray contends that the evidence introduced at trial was insufficient to support his convictions on counts III, IV, V, VI, and VII. Olano argues that his convictions on counts III, VIII and IX should be reversed for insufficiency of the evidence. Both Olano and Gray moved for judgments of acquittal under Fed. R. Crim. P. 29. The district court denied their motions.

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[7] During deliberations, the district court excused one of the alternates upon his request. The other alternate remained with the jury throughout the deliberations until the jury reached its verdict.

Viewing the evidence in the light most favorable to the prosecution, we must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original). *See United States v. Washington Water Power Co.*, 793 F.2d 1079, 1081 (9th Cir. 1986).[8]

1. Count III: Gray

Gray contends that the evidence was insufficient to support his conviction on Count III for willfully causing the interstate transportation (via wire transfer) of $2.346 million from Home Savings to Alliance Federal, knowing that the money had been taken by fraud, in violation of 18 U.S.C. § 2314.[9]

To support a conviction under § 2314, the government must prove beyond a reasonable doubt that Gray (1) transferred or caused to be transferred across state lines (2) monies valued at $5000 or more (3) with the knowledge that such monies had been stolen, converted, or taken by fraud. Gray first argues that there was insufficient evidence to establish his intent to deprive Home Savings of the transferred funds, because, prior to wiring the funds, he had agreed with

[8] We review the appellants' insufficiency of the evidence claims before considering the jury issue because reversal for insufficient evidence would result in acquittal. Reversal on the basis of appellants' remaining claims would permit a retrial.

[9] 18 U.S.C. § 2314 makes it a crime for an individual to "transport[], or transfer[] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud."

Shephard, the president of Home Savings, that the recipient of the funds would be instructed to hold them until Shepherd granted further approval. The record shows that Shepherd gave that instruction but the wire operator inadvertently omitted it. Gray claims that, absent the omission, the funds would never have been disbursed, and that because he did not cause the omission, he did not intend that the money be transferred to Alliance Federal.

To establish that Gray "transferred" the funds in violation of § 2314, the prosecution need only show that Gray *caused* the money to be transferred, not that he personally transferred it. *United States v. Vaccaro*, 816 F.2d 443, 455 (9th Cir. 1986), *cert. denied sub nom. Alvis v. United States*, 484 U.S. 914, 108 S.Ct. 262, 98 L.Ed.2d 220 (1987), and *cert. denied*, 484 U.S. 928, 108 S.Ct. 295, 98 L.Ed.2d 255 (1987); *United States v. Gundersen*, 518 F.2d 960, 961 (9th Cir. 1975) (quoting *Pereira v. United States*, 347 U.S. 1, 9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954)). Jurors may infer intent from circumstantial evidence. *United States v. Kaplan*, 554 F.2d 958, 964 (9th Cir.) (per curiam), *cert. denied*, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1977). The evidence established that Gray underwent considerable efforts to ensure the transfer of the funds. He prepared a commitment letter on Home Savings stationery in Olano's office and used his influence at Home Savings to expedite the loan approval process. Shepherd testified that, notwithstanding the fact that the underwriting process had not yet been completed, Gray pressured him into wiring the funds by threatening to terminate his employment. The fact that Gray agreed to allow Shepherd to place a hold on the funds is not determinative. The prosecution intro-

duced evidence from which a jury could reasonably infer that Gray believed a hold on the funds would be meaningless. Gray apparently knew that Olano exerted considerable influence over the account to which the funds were transferred. The record shows that, under the wire instructions, the funds were to be credited to Alliance Federal through the escrow account. Gray, Olano, and McGuin intended to fund the $2.346 million loan from Home Savings through an account McCuin had at Alliance Federal. More important, the evidence shows that it was Shepherd, not Gray, who sought to place the hold on the funds and who assumed responsibility for releasing the hold at the appropriate time. Gray merely yielded to Shepherd's demand in allowing him to place such restrictions on the account. The record demonstrates that Gray's efforts went solely to ensuring that the funds were wired immediately. Shepherd's failed attempt to block the ultimate transfer does not immunize Gray from responsibility for causing it. Thus, a jury could reasonably have concluded beyond a reasonable doubt that Gray ultimately caused the money to be transferred to Alliance Federal.[10]

Gray also contends that the evidence was insufficient to prove that he knew the funds were procured by fraud. Specifically, he claims that the only fraud associated with the transfer of funds was McCuin's and Mansour's production of false income tax returns and McCuin's submission of a false financial statement to Home Savings. The prosecution did not introduce any evidence regarding Gray's knowledge of

[10] Although the statute makes the transfer across state lines unlawful, the indictment describes the specific offense with which Olano is charged as being the transfer (across state lines) to Alliance Federal.

McCuin's and Mansour's false submissions. However, it proffered ample other evidence of fraud associated with the loan so that a jury could reasonably have concluded beyond a reasonable doubt that Gray knew the monies were taken by fraud. According to the evidence introduced by the government, Gray intentionally deceived the officers and directors of Home Savings by concealing his interest in the McCuin loan. That is, the McCuin loan was simply another facet of the elaborate kickback scheme in which Gray participated. A jury could reasonably have found that Gray's failure to inform Home Savings of this scheme, including his own interest in the McCuin loan, constituted fraud, as the loan might never have been granted if the other directors and/or officers had known of his interest. We therefore reject Gray's contention that there was insufficient evidence with respect to his knowledge that the loan was procured by fraud and find the evidence sufficient to support his conviction on Count III.

2. Count IV: Gray

Gray was convicted on Count IV for willfully misapplying Home Savings' funds, in connection with the McCuin loan, with the intent to defraud, in violation of 18 U.S.C. § 657.[11] Gray claims that the evidence

[11] 18 U.S.C. § 657 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with . . . any land bank, intermediate credit bank, . . . [or] savings and loan . . . association . . . embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

was insufficient to prove that he (1) "willfully misapplied" the funds and (2) had the "intent to defraud" Home Savings.

In defining "wilfull misapplication," courts have generally stated that a person willfully misapplies bank funds by converting them to his, or a third party's, use, benefit, or gain. *United States v. Payne*, 750 F.2d 844, 856 (11th Cir. 1985) (citing *United States v. Britton*, 107 U.S. 655, 666-67, 2 S.Ct. 512, 522, 27 L.Ed. 520 (1883)). Gray asserts that his agreement with Shepherd to place a hold on the funds precluded any rational factfinder from concluding that he was responsible for the actual conversion of the funds. In *United States v. Stuart*, 718 F.2d 931 (9th Cir. 1983), we held that the *actual* disbursement of money is not a prerequisite for conviction for misapplication of monies under § 657. *Id.* at 933. Rather evidence that a defendant instigated the approval of loans larger than necessary—because they included amounts for kickbacks—is sufficient to prove misapplication of funds. Here, the prosecution introduced evidence that Gray pressured Home Savings to fund the McCuin loan to benefit his alleged co-conspirator, Olano. The record shows that McCuin received a $340,000 "furniture allowance" for his role in applying for the loan. A reasonable juror could have inferred from this evidence that the payment to McCuin represented a kickback for his participation in securing the loan and that the necessity for such a kickback made the initial loan amount excessive. Once again, Gray's attempt to rely upon his agreement with Shepherd to place a hold on the funds is of no help to him. A reasonable juror could have concluded that Gray knew that any hold on the funds would be illusory and that his efforts in causing Home Savings to

make loans in excess of the amounts needed would have the effect of diverting bank funds from their intended purposes. Such evidence is sufficient to establish a willful misapplication of bank funds.

Gray also argues that the evidence was insufficient to prove that he intended to defraud Home Savings. We disagree. The prosecution's evidence tended to show that Gray defrauded Home Savings by concealing his involvement in the kickback scheme and that Gray intended unlawfully to deprive the institution of its property by causing it to issue loans in excess of the appropriate amount.

Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence for a reasonable jury to have found beyond a reasonable doubt that Gray misapplied funds in violation of § 657.

3. Counts V, VI, and VII: Gray

Counts V, VI, and VII charged Gray with issuing Home Savings financial obligations "without being duly authorized," in violation of 18 U.S.C. § 1006.[12] Gray contends that the government failed to prove beyond a reasonable doubt that he was "not authorized" to issue these obligations.[13]

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[12] Count V involves a Home Savings take-out loan for $4 million. Count VI relates to a $2.346 loan commitment letter. Count VII is based on an unconditional letter of credit for $3.4 million in favor of defendant Marler, which he used as collateral to obtain an Alliance Federal loan.

[13] Gray also argues that the loan commitments that are the subject of counts V and VI were conditional commitments and thus not "obligations" within the meaning of § 1006. We need not reach this issue, given our resolution of his authorization argument. For purposes of addressing the question whether

§ 1006 provides in pertinent part:

> Whoever, being an officer, agent or employee of or connected in any capacity with . . . any lending, mortgage, insurance, credit or savings and loan corporation or association . . . *without being duly authorized*, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation . . . , or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Id. (emphasis added). Even in the light most favorable to the prosecution, a review of the record demonstrates that the government failed to prove beyond a reasonable doubt that Gray was *not* authorized to issue the obligations.

The two principal items of evidence the government points to are the statements of John Morris, a government agent, and of John Shepherd, the president of Home Savings. These items are insufficient to support the government's burden. Federal Home Loan Bank Board Supervisory Agent Morris testified that he informed Gray in March 1984 that "the proper role of a director is not to be involved in the lending deci-

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Gray was authorized to issue the commitments, we will assume that such commitments constitute obligations under the statute.

sions" of a financial institution. Gray stated that he understood and agreed to refer lending opportunities to the appropriate officers of Home Savings. However, according to Morris' testimony, he informed Gray of a director's "proper role" not in order to officially instruct or adminish him, but to ensure that Gray, who had little banking experience, was aware of "the implications of appearances of conflict of interest in his business dealings and as his role as a new director of a savings and loan." Thus, Morris' statements did not purport to delineate any regulatory rule restricting Gray's conduct; they simply set forth a normative rule which apparently stemmed from Morris' many years of experience in the banking industry.[14]

The defense introduced uncontroverted evidence that the allocation of lending authority to various officers and directors varies among financial institutions. Norman Jenson, a government witness, testified that it is not uncommon for a chairman of the board of an institution to issue obligations and that this practice was found throughout the industry.[15]

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[14] With respect to the character of Morris's statements to Gray, other testimony undermines any contention that Morris officially instructed or reprimanded Gray. Charles Brook, a supervisory agent for both FSLIC and the FHLBB testified that verbal requests made by FSLIC or FHLBB personnel are not binding on an institution. Similarly, Henry Holden, a FHLBB field manager testified that it is FHLBB "policy . . . not to give a verbal warning without a follow up confirmation in writing." There is no indication in the record that Morris ever instructed or admonished Gray in writing. Nor, incidentally, do we think that even if he did the evidence would be sufficient, because the statements pertained to normative, not regulatory, rules.

[15] David Resha testified that in his 16 years as a loan officer and president of a savings and loan association he had never

Thus, in order to prove that Gray did not have authority to issue the obligations, the prosecution should have presented evidence regarding the procedural rules or policies of Home Savings.

The government did not introduce sufficient evidence of Home Savings' rules or policies in regard to the allocation of lending authority. Indeed, the government, despite its own witness' recommendation, did not introduce either the articles of incorporation or the corporate bylaws for Home Savings, or, in fact, any corporate resolutions. The government relies heavily on the testimony of Home Savings' president. It contends that John Shepherd testified that no one may commit Home Savings without Board approval and that this testimony was sufficient to establish the rules regarding lending authority at that institution. However, Shepherd's testimony does not yield such an unambiguous characterization of Home Savings' rules and policies. Shepherd testified that, "I don't *think* that anybody has the right to commit the institution without the proper actions being taken by the institution, but I'm also aware that an officer's signature on a commitment can be

known a director or a chairman of the board to issue a commitment of an institution without a corporate resolution authorizing that act. This testimony merely suggests that directors ordinarily do not issue commitments without corporate resolution. It does not, however, reflect the rules in effect at Home Savings for any given period. Nor does it vitiate Jenson's testimony that a director *may* issue commitments.

Additionally, the testimony of Ashley Branning, who served on the Home Savings Board of directors, and Charles Brooks, a supervisory agent with FSLIC and FHLBB, comport with Jenson's testimony. Both Branning and Brooks stated that authority to issue loan commitments differs in every institution.

binding to the institution, whether it's proper or not." (emphasis supplied). Shepherd's statement does not purport to set forth an official institutional rule—formal or informal—only his own informal opinion as to the authority of the institution's officers, and not its directors, which Gray was. Moreover, his testimony does not identify the source of his informal opinion, and fails to provide a basis upon which a reasonable juror could have concluded that Gray reasonably should have known of any such "rule." [10]

We conclude that the prosecution failed to introduce sufficient proof that the procedures or policies of Home Savings denied Gray authority to issue the obligations. Accordingly, we reverse Gray's convictions on counts V, VI, and VII for insufficiency of the evidence. The determination requires a reversal of Olano's conviction on Count VI for aiding and abetting Gray.

4. Count III: Olano

Olano contends that there was insufficient evidence to support his conviction on Count III for the interstate transportation of funds taken by fraud, in violation of 18 U.S.C. § 2314, because (1) there was no evidence that he had knowledge that the wiring of the funds would be improper and (2) the owner

[10] The only other evidence on which the government relies is Gray's statement that he should not have issued the $3.4 million commitment to Marler and the absence from the minutes of a Home Savings board meeting relating to the McCuin loan of any reference to the commitment. Gray's statement is highly ambiguous, at best, and could just as easily refer to the merits of the loan as to his authority or lack thereof. The failure of the minutes to mention the commitment is of no consequence in the absence of testimony explaining the significance of that failure.

of the funds, Home Savings, consented to that wiring. These claims lack merit. The prosecution introduced evidence that Olano knowingly concealed his interest in the loan. The government's evidence suggests that the $2.346 million loan was primarily for the benefit of Olano, who desperately sought to pay off his debt for the Dauphine Condominiums. According to the government's evidence, Gray and Olano obtained McCuin's assistance by paying him $340,000 from the loan proceeds as a "furniture allowance." Moreover, the closing statement submitted to Home Savings by Olano falsely represented that McCuin paid $414,000 as a cash down payment. Olano also received approximately $25,000 in legal fees for this transaction from the proceeds of the loan, without the knowledge of Home Savings. Thus, there is sufficient evidence to show fraudulent conduct on the part of Olano. It follows that he was aware that wiring the funds would be unlawful. Olano's second argument is equally unavailing. Home Savings' consent is irrelevant. Moreover, the evidence shows that Home Savings' "consent" to disburse the funds was given as a result of the fraudulent scheme manufactured by Gray and Olano. We therefore reject Olano's claim that the evidence was insufficient to support his conviction on Count III.

5. Count VIII: Olano

Count VIII charged Olano with aiding and abetting the defrauding of Home Savings with respect to a $2.346 million loan "*in that*, in return for this loan, Guy W. Olano *caused* Raymond M. Gray to receive reciprocal accommodation loans from Alliance Federal" (emphasis added) in the amounts of $3,400,000, $2,550,000, and $450,000, all in violation

of 18 U.S.C. § 1006. The "in that" clause specifies the wrongful conduct the government must prove in order to obtain a conviction on the particular count involved. Olano asserts that the prosecution failed to introduce any evidence that a fraud was perpetrated on the directors or officers at Alliance Federal or that he *caused* the loans to be received by Gray. Our review of the record leads us to agree with Olano. The record yields no evidence which could reasonably support a conclusion that Olano caused Alliance Federal to issue the "reciprocal" loans to Gray. There is no evidence that Olano pressured any officer or director into approving the loans; there is no evidence that Olano participated in drafting the letters of commitments describing the purposes of the loans; nor is there evidence that Olano in any way facilitated Alliance Federal's making of the loans to Gray.[17] The record indicates that Stewart Kalterman, senior executive vice-president of Alliance Federal and president of Alliance Financial Services (a wholly-owned subsidiary of Alliance Federal which was responsible for underwriting and servicing loans extended by the association), orchestrated the approval of the "reciprocal" loans. Any conclusion that Kalterman

[17] Olano instructed Williams Delsa, an attorney employed in Olano's law office, to prepare the necessary legal documents to transfer title to the Battle Ridge Ranch, which Gray and Marler owned jointly, to Marler alone, in order to avoid exceeding the "loans to one borrower" ceiling. While this evidence suggests that Olano was involved in advising Gray how best to go about applying for the loan, it does not provide a basis from which a jury could have reasonably inferred that Olano *caused* the loan to be made to him. It is worth noting, incidentally, that Delsa testified that he did not believe that the transfer of title for the purpose of meeting the "loans to one borrower" requirement was in any way illegal or improper.

acted at the behest of Olano rests upon speculation, as we find nothing in the record to support such a conclusion.

The government asserts that the evidence of the conspiracy among Olano, Gray, Hilling, and Neubauer was sufficient circumstantial evidence for the jury to infer that Olano used his position as chairman of the board of Alliance Federal to ensure the approval of the reciprocal loans to Gray. We disagree. The prosecution has the burden of showing that the conspiracy extended to the loans to Gray and that Olano used his position as chairman to cause that loan to be made. The prosecution's burden is not met by abstract reference to the fact that Olano was involved in a "kickback" scheme. Rather, the prosecution must show with some specificity that Olano in some fashion caused Alliance Federal to make the particular loans in question. While a reasonable jury could have concluded that Olano indirectly obtained the $2.346 million loan from Home Savings by fraud, it could not automatically infer that the loans to Gray arose under the fraudulent scheme. More important, in the absence of probative evidence, it could not infer that Olano caused the loans to be made to Gray. The record before us demonstrates that the prosecution did not introduce evidence as to any of those considerations. Accordingly, we reverse Olano's conviction on Count VIII and order him acquitted of that charge.

6. Count IX: Olano

In Count IX, Olano was charged with causing false statements to be presented to Home Savings in conjunction with a $2.346 million loan to McCuin,

in violation of 18 U.S.C. § 1014.[18] The superseding indictment states that, in a false financial statement, Olano represented that $414,000 in cash had been received from McCuin as a down payment, and that $99,060.44 had been paid to real estate agencies as commissions. In fact, no cash had been received from McCuin and no fees were paid to the real estate agencies listed in the document. McCuin received $340,000, and $30,000 had been paid to another real estate agency.

Olano asserts that he had no involvement whatsoever with the preparation of the false closing statement; he neither prepared nor signed the document containing the false statements. The critical question here is whether there was sufficient evidence upon which a jury could reasonably have concluded that Olano was responsible in whole or in part for the fact that the closing statement set forth false material information. The false statements were prepared by Olano's notarial secretary, Jane McLaughlin,[19] who

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[18] At the time of Olano's trial, 18 U.S.C. § 1014 provided in pertinent part that:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . a Federal Savings and Loan Association . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

[19] According to McLaughlin's testimony, a "notarial secretary" assists real estate agents or attorneys by preparing and witnessing (i.e. attest to the signature of the person signing)

transcribed the false figures from a purchase agreement. McLaughlin testified that she did not recall who prepared the purchase contract in the Dauphine Condo project. On cross-examination, however, she acknowledged that Joseph Ascani signed the purchase agreement on behalf of Olano. The government also raised doubts about the veracity of McLaughlin's statement that Olano had no role in the actual preparation of the closing statement by eliciting testimony that she *may* have relied on information provided by Olano and that she was unduly loyal to Olano.

Randall Roth, an attorney who worked in Olano's law office, testified that Olano negotiated the terms of the purchase agreement, in particular the $340,000 furniture allowance to McCuin. From this evidence, a jury could reasonably have inferred that Olano instructed his secretary to exclude from the closing statement certain figures listed in the purchase agreement. Such an inference would have permitted a reasonable jury to conclude that Olano "caused" false statements to be submitted to Home Savings. We therefore reject Olano's contention that the evidence was insufficient to sustain his conviction on Count IX. .

B. Alternate Jurors' Presence During Deliberations

1. Standard of Review

Neither Olano nor Gray expressly objected to the district court's decision to retain the alternate jurors after the jury retired to consider its verdict. Accord-

real estate sales documents. A "notary," on the other hand, executes documents—i.e. reviews the documents with the purchaser and seller, signs and affixes his seal on the documents.

ingly, we review this issue for plain error. *United States v. Perez*, 491 F.2d 167, 173 (9th Cir.), *cert. denied*, 419 U.S. 858, 95 S.Ct. 106, 42 L.Ed.2d 92 (1974).

2. Limited Role of Alternate Jurors Under the Federal Rules.

Rule 24(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror *shall be discharged after the jury retires* to consider its verdict.

Fed. R. Crim. P. 24(c) (emphasis added). Rule 23(b) complements and must be read along with Rule 24(c). Rule 23(b) provides that, before or after the completion of the trial proceedings, parties may stipulate to a jury of less than 12; after the jury has retired, the judge may for good cause, with or without the consent of the parties, provide that a verdict may be returned by a jury of 11.[20] In 1983, the Advisory

[20] F. R. Crim. P. Rule 23(b) provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial com-

Committee on Rules squarely rejected the proposal to allow alternate jurors to be present during jury deliberations, or to permit them, regardless of their physical location during the initial part of the jury proceedings, to substitute for regular jurors after the deliberations have commenced. The Advisory Committee noted the inherent constitutional and practical difficulties with such practices. It observed that "there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror." F. R. Crim. P. Rule 23(b) (1990 ed.) (Advisory Committee Notes to 1983 Amendment). The Advisory Committee concluded specifically that the practice "of sending in the alterates at the very beginning with instructions to listen but not to participate until substituted" is impractical and constitutionally impermissible. *Id.*

We have not previously directly resolved the question of the validity of a verdict when alternate jurors are permitted to be present during the jury's deliberations. However, the language of Rule 24(c), Rule 23(b), the Advisory Committee Notes to Rule 23, and related Ninth Circuit precedent clearly establish that the presence of alternate jurors during deliberations when there is any reasonable possibility that they may affect the verdict violates the Rule. *See, e.g., United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1983); *United States v. Lamb*, 529 F.2d 1153, 1156-57 (9th Cir. 1975) (en banc).

Although Rule 24(c) is phrased in unmistakably mandatory language and does not expressly provide

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mences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

for any waiver, we have allowed defendants to consent to a waiver of its requirements under some circumstances. However, in all such cases involving either Rule 23(b) or Rule 24(c), we have required that the record show that the defendants, and not merely their counsel, actually consented to the waiver of their rights. *See United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971) (holding that defense counsel's assertion that defendant has consented, even if defendant acquiesces in defense counsel's assertion is insufficient to waive jury of 12 requirement under Rule 23(b)); *United States v. Reyes*, 603 F.2d 69, 71 (9th Cir. 1979) (concluding that "the *defendant's* expression of consent on the record must appear at the time the stipulation is made" in order to meet Rule 23(b)'s waiver requirements (emphasis added)); *see also United States v. Crisco*, 725 F.2d 1228, 1230 (9th Cir.), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984) (affirming waiver of Rule 24(c) based on written stipulation signed by the government, defense counsel, and the defendant personally); *United States v. Foster*, 711 F.2d 871, 885-86 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 132 (1984) (enforcing written stipulation with respect to Rule 24(c) signed by all the defendants and their counsel).[21]

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[21] In one case decided shortly after Rule 24 was adopted, we upheld a juror substitution that occurred after deliberations had commenced even though there was no express personal consent by the defendants. *See Leser v. United States*, 358 F.2d 313, 317-18 (9th Cir.), *cert. dism'd*, 385 U.S. 802, 87 S.Ct. 10, 17 L.Ed.2d 49 (1966). In *Leser*, however, counsel for defendants had stipulated to the substitution both prior to the time the jury began deliberations and thereafter. In

We note that the requirement that an expression of the *defendant's* consent appear on the record "serves more than the evidentiary purpose of providing reliable evidence that the defendant has in fact consented. . . . [I]t underscore[s] the significant decision faced by the parties." *Reyes*, 603 F.2d at 71. The requirement that the trial court receive express personal consent from the defendant alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of the case. It suggests to him that the alternate jurors' presence during deliberations may amount to participation in the decision-making process—whether in explicit or more subtle forms—as one or more of the deliberating jurors may modify his or her factual determinations and ultimately rest a verdict, in part, on the alternate jurors' "expressions" of their opinions.[22]

Here, the record shows that neither Olano nor Gray ever gave his personal consent to the presence of the alternates during jury deliberations. Moreover, the record is unclear with regard to the question whether counsel for either defendant ever specifically consented to the waiver, although counsel for appellants' co-defendant certainly did. We may assume, *arguendo*, that co-defendant's counsel spoke as counsel for all defendants on this issue. Even so, his consent was insufficient to meet the requirements set forth by *Guerrero-Peralta* and *Reyes*, because the district court did not obtain individual waivers from each defendant personally, either orally or in writing. Nothing in the record suggests that the defendants intelli-

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fact, as the court noted, the issue was discussed repeatedly in the presence of the defendants. We held that, under the circumstances, the appellants had knowingly and intelligently acquiesced in the waiver.

We have seriously doubts that *Leser* is of continuing vitality. All of our subsequent cases have either involved or required personal consents from defendants, both under Rules 23(b) and 24(c). Moreover, in amending Rule 23(b) in 1983, the drafters made it absolutely clear that alternate jurors should not be substituted. The drafters instead gave the district court the discretion to allow a jury of 11 to return a valid verdict if cause existed for excusing one of the jurors after the commencement of jury deliberations. *See* Fed. R. Crim. P. Rule 23(b) (as amended April 28, 1983, eff. Aug. 1, 1983). Finally, *Leser* would not apply in any event, because in that case the court expressly distinguished the circumstances in which more than 12 jurors were present during deliberations. *See Leser*[,] 358 F.2d at 318. Specifically, *Leser* distinguished the *Virginia Erection* line of cases, see discussion *infra*, on the ground that in those cases the alternate juror was permitted to go into the jury room with the regular jurors and remain there during deliberations, whereas in *Leser* there were never more than 12 jurors present during deliberations. Our case falls in the *Virginia Erection* category, rather than under *Leser*.

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[22] With respect to a defendant's waiver of his right to a constitutional jury of twelve under Rule 23(b), we observed in *dicta* that "[a]n oral stipulation may, under certain circumstances, satisfy the Rule, but it must appear from the record that the defendant personally gave express consent in open court, intelligently and knowingly, to the stipulation." *Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971). Subsequently, in *Reyes*, we cast some doubt on whether an oral stiplation might be enough and emphasized the need to follow the explicit language of Rule 23(b), which calls for stipulations in writing. *Reyes*, 603 F.2d 69, 71-72 (9th Cir. 1979). At the same time, we suggested that a thorough investigation by the district judge might be adequate to validate an oral waiver under Rule 23(b). However, we did not *decide* whether under appropriate circumstances an oral waiver might suffice, as we reversed on the ground that there was no indication in the record that the defendant consented to the waiver at all. Here, we are faced with the same circumstance. Again, we need not decide whether an oral stipulation would ever be sufficient.

gently and knowingly consented personally to a waiver of their rights under the Rule. We therefore hold that the district court did not obtain valid consents from the defendants to deviate from Rule 24(c)'s mandatory requirements.

3. District Court's Error Prejudices Defendants' Substantial Rights

We conclude that permitting unauthorized persons to be present in the jury room while the jury is deliberating, in violation of Rule 24(c), is inherently prejudicial. The presence of alternate jurors, even if they are instructed not to participate, infringes upon the jury's privacy and the secrecy of the jury process. *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964). The Advisory Committee on the Federal Rules of Criminal Procedure, agreeing with the reasoning of the Fourth Circuit in *Virginia Erection*, stated that the possibility of sending in the alternates at the very beginning with instructions to listen but not to participate until substituted . . . is . . . attended by practical difficulties and offends 'the cardinal principle that the deliberations of the jury shall remain private and secret in every case.' *United States v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964." Fed. R. Crim. P. 23(b) (1990 ed.) (Advisory Committee Notes to 1983 Amendment).

We cannot fairly ascertain whether in a given case the alternate jurors followed the district court's prohibition on participation. However, even if they "heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible that [their] attitude[s], conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *Virginia*

Erection Corp., 335 F.2d at 872. As Judge Wright wisely observed over fifteen years ago in *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc):

> [T]he presence of an alternate juror in the jury room . . . "destroys the sanctity of the jury." *United States v. Beasley*, 464 F.2d 468, 470 (10th Cir. 1972). The mere presence of the alternate may well have an effect on the deliberations of the twelve. . . .
>
> When an alternate is present in the jury room, thereby violating the privacy of jury deliberations, a problem of constitutional dimension arises. There is thus greater justification for a rule of reversal per se where an alternate is present during deliberations . . . than where an alternate is substituted after deliberations have commenced. *See Leser v. United States*, 358 F.2d 313, 318 (9th Cir[.]), *petition for cert. dismissed*, 385 U.S. 802, 87 S.Ct. 10, 17 L.Ed.2d 49 (1966).

Id. at 1160 (Wright, J., dissenting). Although Judge Wright's prescient remarks were contained in a dissent, the majority opinion is fully consistent with his view.

Given the difficulty of ascertaining the numerous, and often subtle, ways alternate jurors can impinge upon the privacy of the jury, given the potential that their presence may in fact affect the deliberating jurors' ultimate determination if they are allowed to be present, and given the emphatic adoption of the *Virginia Erection* prinicples by the Advisory Committee on the Federal Rules, we conclude that the district court's deviation from Rule 24(c) without the express, personal consent of the defendants was inher-

ently prejudicial. Absent a valid personal waiver by the defendants, allowing alternate jurors to be present during jury deliberations constitutes a violation of Rule 24(c) and requires a reversal of the verdict.[23]

4. Application of Olano's Arguments to Gray

Gray did not raise in his brief the issue regarding the district court's deviation from the procedural requirements of Rule 24(c). However, at oral argument, Gray requested that he be allowed to adopt Olano's arguments regarding the alternate jurors issue. Ordinarily, we would limit each defendant's appeal to the issues specifically raised and argued in his brief. *See United States v. Loya*, 807 F.2d 1483, 1486-87 (9th Cir. 1987). However, Rule 2 of the Federal Rules of Appellate Procedure gives us discretion to suspend the Rules for "good cause shown," or if a failure to review an issue not properly presented would result in manifest injustice. *See id.* at 1487. We believe it would be manifestly unjust to reverse Olano's conviction and not Gray's when both suffered the same prejudice from the same fundamental error in the same trial. *See United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988); *United States v. Gray*, 626 F.2d 494, 497 (5th Cir. 1980), *cert. denied sub nom. Fennell v. United States*, 449 U.S. 1038, 101 S.Ct. 616, 66 L.Ed.2d 500 (1980), *cert. denied*[,] 449 U.S. 1091, 101 S.Ct. 887, 66 L.Ed.2d 820 (1981), *cert. denied sub nom. Barker v. United States*, 450 U.S. 919, 101 S.Ct. 1367, 67 L.Ed.2d 346

[23] Because the violation is inherently prejudicial and because it infringes upon a substantial right of the defendants, it falls within the plain error doctrine. *See United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986) (citations omitted).

(1981); *United States v. Anderson*, 584 F.2d 849, 853 (6th Cir. 1978). Therefore, we consider Olano's Rule 24 argument adopted by Gray for purposes of this appeal.

5. Summary

It is certainly understandable that a trial judge who is nearing the end of a long trial would have concerns about the prospect of trying the case again. Nevertheless, we must all heed Rule 23(b)'s and Rule 24(c)'s unambiguous instructions on how to handle alternate jurors: At the close of trial, the district judge should discharge all the alternate jurors as required by Rule 24(c) and must thereafter resolve any unexpected vacancies by proceeding in the manner provided in Rule 23(b). Under Rule 23(b), when vacancies occur after the discharge of the alternates, the parties may agree to the return of a verdict by 11 or fewer jurors, or, if they fail to do so, the district judge may direct that a verdict by 11 jurors will suffice. However, absent the defendant's valid consent, no alternate should be permitted to join the jury, or be substituted for a juror, once deliberations begin. Here, the district court's decision to allow the alternates to remain present during deliberations without the defendants' express personal consent to a waiver of the rules constitutes plain error. Accordingly, we vacate the convictions of both Olano and Gray on all counts, other than those which we have reversed, *supra*, on the ground of insufficiency of the evidence.

III. Conclusion

Gray's convictions on counts V, VI, and VII are reversed because there was insufficient evidence to support the convictions. Likewise, Olano's convictions on counts VI and VIII are reversed for insufficiency of the evidence. The appellants are ordered acquitted on these counts. With respect to the remaining counts, the convictions are vacated, but the government is not barred from retrying the appellants. The judgment of the district court is reversed in part; the convictions on the remaining counts are vacated, and the case is remanded for further proceedings consistent with this opinion.

REVERSED in part; VACATED and REMANDED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-3128

D.C. No. 86-202-BJR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GUY W. OLANO, JR., DEFENDANT-APPELLANT

Nos. 88-3096 & 88-3295

D.C. No. 86-202-BJR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAYMOND M. GRAY, DEFENDANT-APPELLANT

ORDER

[Filed Oct. 18, 1991]

Before: WRIGHT, REINHARDT, O'SCANNLAIN, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-3128

CT/AG#: CR-86-202-R

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GUY W. OLANO, JR., DEFENDANT-APPELLANT

No. 88-3096

CT/AG#: CR-86-202-R

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAYMOND M. GRAY, DEFENDANT-APPELLANT

No. 88-3295

CT/AG#: CR-86-202-R

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAYMOND M. GRAY, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Washington (Seattle)

JUDGMENT

[Filed Dec. 13, 1991]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED in part; VACATED and REMANDED in part.

Filed and entered 5/31/91

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NO. 91-1306

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

-VS-

GUY W. OLANO, JR., AND RAYMOND M. GRAY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Guy W. Olano, Jr.,
Appellee/Pro Se
P. O. Box 55494
Metairie, La 70005
(504) 835-4909

QUESTION PRESENTED

Whether reversible error is committed by allowing the alternates to remain in the jury room during deliberations?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAY IT PLEASE THIS HONORABLE COURT, now into Court comes the Appellee, Guy W. Olano, Jr., appearing herein Pro Se and who does file this brief in Opposition to Writ of Certiorari filed by the Solicitor General on behalf of the United States to review a Judgement of the United States Court of Appeals for the 9th Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals reported at 934 F.2d 1425.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 24(c) concerning alternate jurors.

PERCEIVED MISTATEMENTS OF FACT

There are several mistatements of fact that must be called to the Court's attention in order to properly review the issues presented to this Honorable Court.

First of all, the Solicitor General would attempt to have this Honorable Court consider the issue solely as to whether to allow alternate jurors to be present during the jury deliberations as automatic reversible error, even when the defense consents to that procedure. It is respectfully suggested that this is an inaccurate formulation of the question as it should be considered by this Honorable Court.

As will be seen here in this brief, and which will be differentiated and distinguished from the cases as cited by the Solicitor General, the facts are clear that in the instant case we did not have a situation where the two alternate jurors went into the jury room and sat throughout the deliberations while a decision was reached by the 12 members of the jury panel. Instead we have a situation where two alternate jurors went into the jury deliberation room after having received their instructions and began to deliberate. Thereafter, on the second day of deliberations one of the alternate jurors asked to be excused, and was in fact excused from any further deliberations. The other alternate stayed in the jury room throughout the deliberations.

So this is not a case where we have one or two alternates go into the jury deliberations and stay with the jury panel throughout the deliberations, but instead have

one juror after listening to one day of deliberations and possibly participating in same, or making facial expressions, gestures, or the like prior to leaving the jury deliberations, walking out and being excused.

The second mistatement of fact is where the Solicitor General states in his question presented to this Honorable Court that the defense consented to that procedure. This too is an inaccurate statement in that at no time during the proceedings at the District Court level did my counsel, Mr. Ken Kanev, nor myself consent to this procedure. In fact, as my brief will show, the only time this issue was discussed and I was present in the Courtroom was when it was decided by counsel for the defendants that the alternates would <u>not</u> go into the jury deliberation room to deliberate. Apparently when this matter was rediscussed in the Courtroom as can be seen from the record I was not present because the Marshals had failed on repeated occasions to bring me into the Courtroom in time prior to there being any discussions on the record.

It is respectfully submitted that these two perceived statements of fact are very important in that they differentiate between the facts contained in the decisions that the Solicitor General uses to present his case to this Honorable Court.

STATEMENT

The trial of this matter was tried before a jury composed of twelve members plus two alternates.

On May 28, 1987 at 4:14 P.M. the jury retired to commence deliberations (RT 10803). Immediately prior to the jury retiring, the Court had the following colloquy with the jurors: (at RT 10802-03)

"We have indicated to you that the parties would be selecting alternates at this time. I am going to inform you who those alternates are ... and since the law requires that there be a jury of twelve, it is only going to be jury of twelve. But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate. The alternates are Norman Sargent and Shirley Kinsella.

I am going to ask at this time now, Ladies and Gentlemen, that you retire to the jury room and begin your deliberations ... if you will retire to the jury room, please".

(at 4:14 o'clock P.M., the jury retired to commence deliberations)

As is abundantly clear from the trial transcript, the twelve members of the jury and the two alternates went into the jury room and started deliberations. Then on May 29, 1987, according to the District Court Clerk's record of the docket (CR 684):

"Alternate Juror N. Sargent asks to be excused, granted."

So the jury makeup started out with twelve jurors in the jury room deliberating in the presence of the two alternates and then on the next day one alternate leaves the jury room leaving now twelve jurors plus one alternate present. Also on May 29, 1987, the defendant-appellee Mr. Olano was not present at the courthouse or courtroom having the day before waived his presence for jury deliberations of this complex and lengthy case (At RT 10807).

"Mr. Kanev: My client wishes to waive his presence, given his custodial situation".

The Court: Okay"

It is also relevant to note the following dialogue that took place in open court outside of the presence of the jury just prior to the noon recess on May 28, 1987 (RT 10733)

"The court: Do you have your alternate's name? Do you want to give me a slip with it before you leave?

Mr. Westinghouse: Your Honor, we need to discuss it for just another moment.

The Court: How about you all?

Mr. Robison: Can we discuss it over the lunch hour and submit it after lunch, Your Honor?

The Court: Yes, but really do it because at the conclusion of the government's case, I've got to say something or fourteen people are going back in that room. Otherwise, I send fourteen people back in while you decide and that's usually not something anybody wants me to do because we're going to start sending exhibits in and the whole works.

Mr. Robison: We'll meet right now.

The Court: Okay, you can all stay here as long as you need to take care of it. See you back here at 2:00"

(noon recess)

Due to the custodial status of the defendant-appellee, Mr. Olano was taken out of the courtroom and brought up to the Marshal's office and put into the holding cell.

At 2:00 P.M. on May 28, 1987 the afternoon session started, and the following colloquy took place out of the presence of the jury and out of the presence of the defendant-appellee, Mr. Olano, who had not yet been returned to the courtroom by the Marshals. (RT 10736-37).

"The Court: Well, Counsel, I received your alternates do I understand that the defendants now it's hard to keep up with you, counsel. It's sort of a day by day -

but that's all right. You do all agree that all fourteen deliberate? Okay. Do you want me to instruct the two alternates not to participate in deliberation?

Mr. Kellog: It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

The Court: Well, have you told each other who your alternates are?

Mr. Westinghouse: Yes, Your Honor

The Court: Okay, I'll announce it at the end. I'm kind of glad you reached that decision counsel. I kind of think they deserve it. They really have been just a superb jury, and I think they'll be glad."

At no time did the defendant-appellee give his consent to this procedure, on or off the record. This was not the first time during the trial that the Marshals failed to get Mr. Olano into the Courtroom timely as reflected in the transcript at (RT 2-21;320). [See Record Excerpts "F"] In fact, the Judge had to admonish the Marshals on this subject (RT 429-430). [See Record Excerpts "F"] The first time the Court brought up the issue of the alternates going into the jury room was on May 26, 1987 (at RT 10400-401):

"The Court: My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can - if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony and that is to let the alternates go in but not participate but just to sit in on deliberations. Its strictly a matter of courtesy and I know many judges have done it with no objection from counsel. One of the other things it does is if, they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth - unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got

too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know."

Then the next day on May 27, 1987 the Court again addressed the alternates issue where it was agreed in the presence of the defendant-appellee that the alternates not go into the jury room during deliberations. At (RT 10609):

"The Court: Now, the second question is, have you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

Mr. Robison: We would ask that they not."

REASONS FOR NOT GRANTING THE PETITION

The petition for Writ of Certiorari should not be granted because there is no conflict between the various circuit Court of Appeals on this issue. All of the cases cited by the Solicitor General differentiated and are distinguishable from the factual situation as it is presented in the instant case for the following reasons. As stated previously herein, the two alternates did not stay with the jury throughout their deliberations, but instead after one day of deliberations broke up the sanctity of the jury room by leaving and being excused. On all of the cases cited by the Solicitor General the alternates remained with the twelve jurors until a decision was rendered.

Further, all of the cases cited by the Solicitor General are distinguishable from the instant case in that the only time the issue concerning the alternate jurors was discussed in open court in the presence of the defenant was when all counsel agreed that the alternate jurors not go into the jury room to deliberate. Further discussion that was had in the court room concerning the presence of the

alternate jurors in the jury room was done outside of the presence of myself, and which I had no knowledge of. Therefore, my consent was not only not waived by me, whether explicitly, tacitly or implied, nor was it ever waived by my counsel. As the record reflects, and the Solicitor General states in his brief to this Honorable Court, my attorney objected to the presence of the alternate jurors in the jury room, and no where in the record is it reflected that my counsel agreed to allow the alternates to go into the jury room especially in my presence.

It is well established that "trial by jury" contemplated by Article 3, Section 2, of the Constitution of the United States is a trial by a jury of twelve persons - neither more nor less. Patton v U.S., 281 U.S. 276, 509 S. Ct. 253, 74 L.Ed. 854 (1930).

Rule 23B of the Federal Rules of Criminal Procedure makes it unmistakably clear that a jury shall be of twelve except that the number may be less in the event that the parties so stipulate in writing, but no rule makes provisions for a jury of more than twelve.

The Federal Rules of Criminal Procedure make further provisions for preserving the Constitutional Jury of twelve which a defendant is entitled. Rule 24 (c) in pertinant part provides: "The Court may direct that not more than four (4) jurors in addition to the regular jury be called and paneled to sit as alternate jurors. Alternate jurors in the order that they are called shall replace jurors who, prior to the time the jury retires to consider it's verdict, become unable or disqualified to perform their duties ... an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider the verdict." [emphasis supplied]

The unimbiguous language of Rule 24 (c) and the cases interpreting it have impelled one of the nations most prestigious legal commentators to conclude that: "it is reversible error, even though the defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate". C. Wright, Federal Practice and Procedure, 388 Volume 2 at p. 52 (1969).

It is manifestly clear that the defendant-appellee has a constitutional right to a jury of twelve. In the instant case this constitutional right was violated and should result in a reversal of the defendant-appellee's conviction.

Furthermore, the right of the defendant accused of serious criminal charges to be tried by a jury of properly chosen jurors cannot be waived by an attorney without the defendant's consent. Patton v U.S., supra. The Patton Court said that "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions that before any waiver can become effective the consent of the government counsel, and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant. [emphasis supplied].

Patton has since been interpreted to require that the defendant himself, and not merely defendant's counsel approve a stipulation before it operates as a waiver of the defendant's rights respecting the jury that tries him. See U.S. v Virginia Erection Corporations, infra.

The Ninth Circuit Court of Appeals in U.S. v Guerrero Peralta, 446 F.2d 876 (9th Cir. 1971) has ruled on similar issues affecting the jury and has held that the defendant's written consent, or at a minimum, at least

verbal consent, must be obtained and appear on the record. In the case at bar, it is clear that this was not done.

The Court in U.S. v Virginia Erection Corporation, 335 F.2d 868 (4th Cir. 1964) held in a similar case that it was reversible error for the District Court to permit the alternate juror to retire to the jury room with 12 regular jurors when one of the regular jurors appeared to be ill. This was their ruling even though counsel agreed to the procedure, and though the alternate juror was admonished not to participate in deliberations of the jury, and to say nothing. This is analogous to the base at bar. But just as in the Virginia Erection case, and in the case at bar, whether in fact the alternates obeyed the Court's instructions and remained silent can't be seen from the record. However, it is entirely possible and highly probable that their attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors. In any event, the presence of the alternates in the jury room violated the cardinal principle that deliberations of the jury shall remain private and secret in every case. The presence of any other person other than the jurors to whom the case has been submitted for decision impinges upon that privacy and secrecy. It is possible that the alternates may have operated to some extent as a restraint upon the jurors and their freedom of action and expression. The sanctity of the jury was destroyed, and a problem of constitutional dimensions arose.

In U.S. v Essex, 734 F.2d 832 (U.S. Court of Appeals D.C. 1984) this Appellate Court too held that it was plain error for the trial court to permit the alternate juror to retire to the jury room for deliberations with other jurors, even for a period as little as 45 minutes, and even when the alternate says nothing. The Court went on to say that where the Appellate Court determines that plain error has been

made, prejudice is inherent in the error, and the defendant is not required to prove that he is innocent, or that the outcome of trial would have been different if error had not been made. The potential for serious harm and the interest of the defendant and the public in fair, unbiased and secret deliberations are so great that no evidentiary showing of actual prejudice, or of defense counsel's objection to the internal functioning of the jury of which he could not possibly be informed, is required.

In the Solicitor General's brief he states the reasons why the petition should be granted, and uses as his basis the following arguments. He states that the Court of Appeals' decisions conflicts with decisions of other Courts of Appeals holding that violations of Rule 24(c) do not require reversal of a criminal conviction absent a showing of prejudice. It is respectfully submitted to this Honorable Court that these cases as will be discussed herein are distinguishable from the instant case for the reasons previously stated herein.

The Solicitor General also bases his argument on the fact that the decision is also inconsistent with decisions of this Court recognizing that very few trial errors should result in reversal of convictions absent a showing of prejudice to the defendant. The case law is abundantly clear in that cases concerning the issue of alternate jurors inside of a secretive jury deliberation room it is virtually impossible for the defendant to prove the prejudice that occured behind closed doors, especially now years after the trial. And as the Solicitor General finally argues the Court of Appeals decision was inconsistent with the principle that the defendants could not obtain reversal of their convictions based on claims of procedurel irregularity to which their counsel had consented. Again, as is abundantly clear from the record, counsel for Guy W. Olano,

Jr. never consented to the procedure nor did I myself ever consent to the procedure, nor was I ever even aware of the procedure. I was not in the Court room at the time the discussion was continued.

In support of the Solicitor General's argument he cites the following jurisprudence to wit:

1. United States v Reed, 790 F. 2d 208, 210 (2d Cir), cert. denied, 479 U.S. 954 (1986). The Reed case is clearly distinguishable from the instant case in that the alternate juror was permitted to participate in the jury's deliberations and to cast a vote for conviction. Actually this was clearly not the same situation as we have in the instant case where one of the alternate jurors left the jury deliberations after one day of deliberating. The sanctity of the jury room was destroyed when the alternate left after one day of deliberating.

2. United States v Kaminski, 692 F. 2d 505 (8th Cir. 1982). Here too the District Court allowed an alternate jury to sit with the jury during deliberations, but later substituted that alternate for one of the jurors. Again, the underlying factual issues in this case are clearly distinguishable from the case at bar.

It is also very meaningful to note that while the Solicitor General would have this Honorable Court believe that some showing of prejudice must be made in order for their to be a reversal, and uses the jurisprudence stated within their brief to support their position, that it was not until I read the transcripts of the trial that were provided to me after almost one and one half years after the jury's decision, that I learned of the alternate jurors going into the jury room and one of them being excused after one day of deliberations.

The record is clear that I was not in the Court room at the time the Court informed counsel that the alternates were going into the jury room; in fact the only time I was in the Court room to hear discussions concerning the alternates was when it was decided that the alternates not go into the jury room. After that period of time I was not in the Court room at the time that the jury decision was returned. Thereafter, it was not until almost a year and a half later that I was provided with transcripts from an appointed counsel who had not even started to read the transcripts, and therefore I was compelled to handle my appellate brief pro se, did I learn of these irregularities. So for the Solicitor General to state that no prejudice was shown clearly has no merit, and should have no merit in 1992 more than 5 years after the trial of this matter.

I would respectfully represent to this Honorable Court that jurisprudence that has previously been decided by the various Circuit Courts of Appeal are distinguishable and different from the current factual situation before this Honorable Court; and therefore the Petition for the Writ of Certiorari should be denied.

The Solicitor General also addresses the issue that the Constitution of the United States does not mandate a jury of twelve, and therefore allowing alternates to be present during jury deliberations thereby increasing the number of jurors would not be inherently prejudicial to the defendants. Again, factually this is not the case before the Honorable Court. The two alternates did not remain in the jury room during deliberations, however one of the alternates after one day of deliberations got up and left the jury deliberation room. So the issue before the Court is not whether a jury of fourteen can decide a defendant's

fate, but whether after the jury begins to deliberate a juror can get up from the jury room and leave.

The Solicitor General also states that the respondents failed to object to sending the alternates in the jury room. This is clearly a perceived mistatement of fact in that the only time that I was present in the Court room is when we objected to sending the alternates into the jury room. So it is abundantly clear that I did not fail to object to sending the alternates into the jury room nor did my counsel fail to object, because the only time this issue was raised in my presence is when my counsel did object at my insistence that the alternates not go into the jury room. The Solicitor General continues his argument by stating that the respondents did not simply fail to object to allow the alternates to remain with the regular jurors during deliberations; through counsel, they affirmatively consented to that procedure. This again is a misperceived statement of fact in that again and out of an abundance of caution, I would reiterate that the only time that this issue was raised in my presence was when we did object to the alternates going into the jury deliberation room, and that at no time did my counsel affirmatively consent to the procedure. Therefore, the "invited error" doctrine is inapplicable to the instant case.

The Solicitor General would also argue to this Honorable Court that when a defendant is represented by Counsel, that that Counsel has the right to make strategic and tactical trial decisions. This proposition that the lawyer is the agent of his client, and his statements and representations in open Court may be accepted in open Court has an exception; showing gross negligence by the attorney. Failure of my trial counsel to attend the pre-trial conference, and his failure to inform me of the possibility of a hybrid procedure amounted to gross negligence. See

U.S. v McKeon, 738 F. 2d 26, 30 (2d. Cir 1984); and Brown v Wainwright, 665 F.2d 606, 612 (5th Cir. 1982) (en banc).

CONCLUSION

In my appellate brief to the 9th Circuit Court of Appeal I raised 41 assignments of error. Of these assignments of error the 9th Circuit Court of Appeal choose to reverse my conviction on the issue presented herein. The other issues I raised as assignments of error were not considered by the Honorable 9th Circuit Court of Appeal with the exception that the Court did hold that there was insufficient evidence to support my conviction under 18 U.S.C. 14. It is respectfully suggested that the decision by the 9th Circuit Court of Appeal concerning the issue briefed herein was the proper decision, and one that is distinguishable from decisions of other Court of Appeals as specifically enumerated herein. The Petition for a Writ of Certiorari should therefore be denied. I would also pray that this Honorable Court allow me to join in by reference herein to any and all issues and arguments raised by my co-defendant's, Raymond Gray's, counsel before this Honorable Court.

Respectfully submitted,

Guy A. Olano, Jr.
Appellee/Pro Se
P. O. Box 55494
Metairie, Louisiana 70005

(2)

No. 91-1306

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

GUY W. OLANO, JR., and RAYMOND M. GRAY

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT GRAY'S BRIEF IN OPPOSITION

WILLIAM J. GENEGO
100 Wilshire Boulevard
Suite 1000
Santa Monica, California 90401
(310) 394-5802

Attorney for Respondent Raymond M. Gray

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Raymond M. Gray, by his attorney, hereby responds to the Solicitor General's petition asking this Court to review the decision of the Ninth Circuit Court of Appeals reversing his conviction and ordering a retrial. The petition should be denied for a number of reasons.

First, any further appellate review of the court of appeals' decision is moot. The government failed to comply with the Federal Rules of Appellate Procedure and never asked the court of appeals to stay the issuance of the mandate. *See* Fed. R. App. P. 41(b). As a result, the mandate ordering a new trial, which constitutes final judgment, has issued and has been received by the district court. Section I, *infra*.

Second, the factual assumptions made by the government in requesting review are not supported by the record. The "question presented" as stated by the government's petition, rests on the factual premise that the defendants did not object, and in fact consented, to allowing the alternate jurors in the jury room during deliberations. *See* Government's Petition For A Writ of Certiorari at (I) (hereafter "Gov't. Pet. at xx"). That factual premise is not supported by the record, at least not with respect to Mr. Gray. Mr. Gray's attorney, on the only occasion he addressed the alternate juror issue, specifically requested the district court *not* allow the alternates in the jury room during deliberations. While an attorney for a co-defendant did later apparently consent to the procedure, there is no indication in the record that this attorney was acting on behalf of Mr. Gray or, even if the attorney thought he

was, that he had been authorized to do so. Section II, *infra*.

Third, the conflict claimed to exist among the circuits in the government's petition is illusory. There only appears to be a conflict because the government lumps together all cases deciding Rule 24(c), Fed. R. Crim. P., issues as if all Rule 24(c) errors were the same. They are not; in fact, the cases cited by the government illustrate and resolve distinctly different types of Rule 24(c) errors. When the cases said to be in conflict are examined according to the particular type of Rule 24(c) error presented, the supposed conflict disappears. Section III, *infra*.

Fourth, contrary to the protestations of the government, the court of appeals' decision that the Rule 24(c) error in this case warranted reversal without a showing of prejudice is not in conflict with this Court's decisions on prejudice or waiver. In arguing that the court of appeals erred by reversing without requiring proof of prejudice, the government incorrectly characterizes the error in this case as one involving jury size (the "rule of 12"). The error here was not a violation of the rule of 12; the error was an intrusion on the privacy and secrecy of those persons who must vote a defendant's fate. As such, the likelihood of prejudice is great, but the ability of a defendant to prove prejudice is nearly impossible. As this Court has recognized, when the potential prejudice from an error is great, but the nature of the error makes proof of prejudice difficult, it is appropriate to dispense with the need for proof of actual prejudice. Section IV, *infra*.

Similarly, the supposed conflict with this Court's personal waiver decisions is also manufactured. The government relies on general waiver cases and broad statements of the law without any reference to the source or nature of the error in this case. What occurred here was a violation of a mandatory provision of a Federal Rule of Criminal Procedure which, by its own terms, does not permit anyone to waive its provisions or consent to its violation. Under those circumstances, where there is no lawful basis for a waiver and no possible tactical reason for doing so, a personal waiver of the defendant should be required. The court of appeals, in ruling that a personal waiver was required under these circumstances, did not act contrary to this Court's decisions. Section V, *infra*.

Finally, the error ridden history of this prosecution, as illustrated in the procedural history section below, strongly counsels against the granting of certiorari on the issue requested by the government. This prosecution was ill-conceived from the outset and the errors have multiplied ever since. The government's attempt to salvage its dubious trial victory is likely to be without purpose as the court of appeals itself noted that the appeal raised additional substantial issues (which the court found unnecessary to reach) that will inevitably result in a reversal and new trial, regardless of any decision by this Court on the issue raised in the government's petition.

PROCEDURAL HISTORY

A superseding indictment issued December 8, 1986, by a grand jury in the Western District of Washington,

named Raymond M. Gray and eight other persons as defendants. The indictment was 63 pages in length and contained 17 counts; Mr. Gray was named in eight of the counts (one conspiracy count and seven substantive counts). In a remarkable example of venue shopping, the indictment was returned in the Western District of Washington (Seattle) even though none of the defendants resided in that jurisdiction.[1]

Two defendants were severed and tried separately. Mr. Gray and the other six defendants tried with him, endured a three and a half month trial, all but a few days of which consisted of the government's presentation of its case. At the conclusion of its deliberations, the jury acquitted three defendants on all counts (Ascani, Kalterman and Marler), acquitted two defendants on all counts except the conspiracy count (Hilling and Neubauer) and convicted two defendants on all counts (Gray and Olano, the two bank presidents).

The direct appeal of co-defendants Hilling and Neubauer's appeal was heard separately. The court of appeals reversed their convictions because count I, the conspiracy count, improperly alleged an "intangible rights" fraud in violation of this Court's decision in *McNally v. United States*, 863 U.S. 677 (1987). *See United States v. Hilling*, 863 F.2d 677 (9th Cir. 1988). After the case was remanded, the government dismissed the indictment against both Hilling and Neubauer.

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[1] The charges in the indictment centered around the alleged defrauding of three savings and loan institutions, one of which (Home Savings and Loan) had its main office in Seattle.

Mr. Gray's direct appeal resulted in his acquittal on three counts; the court of appeals found that despite having three and a half months to do so, the government had failed to present evidence that was legally sufficient to support a conviction on counts V, VI and VII. Similarly, the court of appeals ordered Mr. Olano acquitted of two counts.[2]

Mr. Gray and Mr. Olano raised numerous other issues in their direct appeals. For example, Mr. Gray maintained that the same *McNally* error that required reversal of the convictions of Hilling and Neubauer also required reversal of his convictions on counts one and two, as those counts contained the "intangible rights" theory of fraud held to be invalid under *McNally* in the earlier appeal of Hilling and Neubauer. Mr. Gray also argued that the *McNally* error in the conspiracy count (count I) required reversal of his convictions on all the remaining counts. This is because the trial court instructed the jury on a "Pinkerton" theory of liability, which permitted the jury to convict Mr. Gray of all of the substantive counts of the indictment based solely on the invalid *McNally* conspiracy count.

It was also argued that reversal was required on all counts because, in a seemingly unprecedented instance, one of the jurors was inexcusably absent during an afternoon of the trial but yet the district court allowed the trial

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[2] The government does not seek review of the court of appeals' order directing Mr. Gray's or Mr. Olano's acquittal on these counts, nor did the government raise this issue in its petition for rehearing with the court of appeals. *See* Gov't Pet. at 5, n.1.

to continue. Still further legal and evidentiary claims were raised by Gray and Olano.

The court of appeals, while recognizing that these claims were properly characterized as "substantial issues," found it unnecessary to address them because of its ruling on the Rule 24(c) – jury deliberation error. As noted in the government's petition, the court of appeals, after finding the government's evidence legally insufficient on three counts against Mr. Gray and two counts against Mr. Olano, reversed their conviction on all the remaining counts because the alternate jurors were not discharged when deliberations began (as is made mandatory by Rule 24(c)), and the alternate jurors were then allowed in the jury room during deliberations.[3] *See* Pet. App. at 3a, n.3.

ARGUMENT

I. THE GOVERNMENT NEVER REQUESTED THE COURT OF APPEALS TO STAY THE ISSUANCE OF THE MANDATE; AS A RESULT, THE MANDATE AND ORDER FOR A NEW TRIAL, WHICH CONSTITUTES THE FINAL JUDGMENT, WAS ISSUED BY THE COURT OF APPEALS AND RECEIVED BY THE DISTRICT COURT; ANY FURTHER APPELLATE REVIEW IS THUS MOOT

The court of appeals' decision reversing the defendants' convictions was issued May 31, 1991. The

[3] Thus, even if the government were successful in this Court on the alternate juror issue, on remand the Court of Appeals would then need to address the other "substantial issues" raised by Mr. Gray and Mr. Olano.

government's petition for rehearing, with a suggestion for rehearing *en banc*, was denied October 18, 1991. The Federal Rules of Appellate Procedure provide that the mandate of the court of appeals shall issue within 7 days of that date. *See* Fed. R. App. P. 41(a). Where a party seeks, or intends to seek, review by this Court, Rule 41 provides that the party can ask the court of appeals to stay the issuance of the mandate. *See* Rule 41(b). The government here did not comply with Rule 41(b) and never asked the court of appeals to stay issuance of the mandate; as a result, the mandate was issued by the court of appeals and received by the district court on or about December 10, 1991.

The issuance of the mandate constituted final judgment. *See York International Builders, Inc. v. Chaney*, 527 F.2d 1061, 1066 (9th Cir. 1975). Further, once the mandate ordering a new trial was received by the district court, the time limitations of the Speedy Trial Act were put into effect. *See United States v. Crooks*, 826 F.2d 4, 5 (9th Cir. 1987); 18 U.S.C. section 3161(e).

In January, 1992, after the mandate had been received and the Speedy Trial clock had begun to run, the government filed a motion with the district court seeking a stay of the proceedings pending its petition for a writ of certiorari to this Court.[4] The district court granted the stay. Even assuming the speedy trial time limit has been

[4] Curiously, the government's motion for a stay included a request that the stay apply to defendants Hilling and Neubauer, even though there were no proceedings against either of them; the government had previously voluntarily dismissed the indictment against them after their convictions had been reversed on appeal.

tolled by the district court stay, the fact remains that the mandate and final judgment has been issued by the court of appeals and received by the district court. Since the government allowed the judgment to become final, that final judgment should be honored. To rule otherwise would make Rule 41(b) meaningless. Thus, the government's present attempt to have the order for a new trial reversed and vacated is moot.[5]

II. THE CENTRAL FACTUAL PREMISE OF THE GOVERNMENT'S PETITION – THAT THE DEFENDANTS DID NOT OBJECT AND THAT THEIR ATTORNEYS, IN FACT, CONSENTED TO THE ALTERNATE JUROR DELIBERATION ERROR – IS NOT CONSISTENT WITH THE RECORD BECAUSE MR. GRAY'S ATTORNEY SPECIFICALLY OBJECTED TO THE PROCEDURE

A. *The Government's Arguments As To Why Review Should Be Granted Rest On The Assumption That There Was No Objection To The Alternate Juror Error By The Defendants And That The Defendants' Attorneys Consented To The Erroneous Procedure*

The government's petition states that the issue presented is "[w]hether allowing alternate jurors to be

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[5] In footnote 2 of the opinion in *United States v. Villamonte-Marquez*, 462 U.S. 579, 582, n.2 (1983), the Court rejected an argument that the issuance of the mandate rendered further review by this Court moot. *Villamonte-Marquez* is distinguishable, however, since in that case the government had dismissed the underlying indictment. With the indictment dismissed, there was no district court proceeding to which the mandate could apply.

present during jury deliberations is automatic reversible error, *even when the defense consents to that procedure.*" Gov't Pet. at (I) (emphasis added). As the government's statement of the issue suggests, its request for review – and its disagreement with the court of appeals' decision – rests on the assumption that there was no objection by the defendants to the Rule 24(c) error and that defense counsel, in fact, consented to the error.

Thus, the government argues that review should be granted because "[r]espondents failed to object to sending the alternates into the jury room." Gov't. Pet. at 13. Similarly, the government criticizes the court of appeals' decision, and argues review should be granted, because the court of appeals ruled that even though the attorneys consented to the error, attorney consent was not sufficient to vitiate the error; personal consent of the defendant was required. Gov't Pet. at 15 ("In order to forfeit the Rule 24(c) claim, the court of appeals held, the defendants had to consent to the procedure personally. There is no sound basis for that holding.")

Thus, all of the reasons the government presents as to why the petition for review should be granted rest on the critical assumption that there was no objection by the defense to the alternate juror deliberation error. The government is particularly adamant that review should be granted and a reversal ordered because defense counsel consented to the procedure. Taking the government's argument at face value, if there was an objection to the procedure by defense counsel, then there is no basis for review by this Court.

B. *Mr. Gray's Attorney Specifically Objected To The Alternate Jurors Being Allowed In The Jury Room During The Deliberations*

As the court of appeals explains in its decision, "before the conclusion of the trial, the district judge suggested that the two alternate jurors be allowed to remain with the jury during deliberations, unless the parties had an objection." Pet. App. 5a (footnote omitted). As the court went on to explain:

> The following day, the court asked defense counsel "whether you want the alternates to go in and not participate." Olano's counsel responded, "We would ask that they not."

Pet. App. at 5a (quoting the trial transcript).

Although the opinion attributes this objection to counsel for defendant Olano, it was actually stated by attorney Kent Robison, counsel for defendant Gray, not defendant Olano. *See* Trial Transcript at 10609.

The opinion further notes that on the day following this objection, the district court again raised the question by inexplicably asking "You do all agree that all fourteen deliberate? Okay. Do you want me to instruct the two alternates not to participate in the deliberation?" Pet. App. at 6a. The attorney for defendant Hilling then stated: "That's what I was on my feet to say." *Id.*

In deciding that the alternate juror error required reversal, the court of appeals noted that "the record shows that neither Olano or Gray ever gave his personal

consent to the presence of the alternates during the jury deliberations. Moreover, the record is unclear with regard to the question of whether counsel for either defendant ever specifically consented to the waiver, although counsel for appellants' co-defendant certainly did." Pet. App. at 27a. In ultimately ruling that the personal consent of the defendants was required, the court "assume[d], *arguendo*, that co-defendant's counsel spoke as counsel for all defendants on this issue." *Id.*

The court of appeals cited no basis for its assumption that the consent of one attorney for a different defendant should be, or could be, held binding on another counsel or another defendant. A transference of consent on such an important question as juror deliberations is particularly inappropriate and unjustified as applied to Mr. Gray, since the only time his attorney addressed the issue, he asked that the alternates *not* be allowed in the jury room during deliberations.

The record simply does not support review of the question presented by the government. This Court's review should not be premised on the same undocumented and unjustified transfer of consent employed by the court of appeals.[6] Rather, review should be based on

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[6] If the Court were to review the case on this same unfounded assumption, any ruling in favor of the government would have to be accompanied by an order that the case be remanded to the district court to make findings as to whether

(Continued on following page)

the record as it stands: a specific objection to the procedure by Mr. Gray's attorney, followed by the consent of an attorney for a different defendant for which there is no basis to attribute to Mr. Gray or his attorney. Given this record, the entire basis for the government's requested review – that there was no objection and, in fact, consent to the procedure by defense counsel – evaporates, especially as to Mr. Gray.

III. THE GOVERNMENT'S CLAIMED CONFLICT AMONG THE CIRCUITS IS ILLUSORY

The government argues review should be granted because there is a conflict among the circuits "on the question of whether a violation of Rule 24(c) is reversible error per se." Gov't Pet. at 7. There is only a conflict because the government combines together all Rule 24(c) cases as if they all addressed the same type of error; they do not. Once the cases are separated by the nature of the Rule 24(c) error, the conflict disappears.

A. The Types of Rule 24(c) Errors

Rule 24(c) requires that alternate jurors shall be discharged when the regular jurors retire to begin their deliberations. A review of the case law illustrates that a violation of Rule 24(c) may result in a number of distinctly different types of error. First, an alternate juror

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(Continued from previous page)

the consent of the attorney for co-defendant Hilling constituted consent by Mr. Gray's attorney, especially in light of his earlier objection.

who has not been discharged might be kept apart from the regular jurors during deliberations. *See, e.g., United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1983). Second, an alternate juror who has not been discharged might be substituted for a regular juror after deliberations have commenced, and at that time made a regular juror with authority and responsibility for deciding the case. *See, e.g., United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982); *Leser v. United States*, 258 F.2d 313, 317 (9th Cir.), *petition for cert. dismissed* 385 U.S. 802 (1966). Third, an alternate who has not been discharged might be made a regular juror when deliberations commence, thereby effectively increasing the size of the jury. *See, e.g., United States v. Reed*, 790 F.2d 208, 210 (2d Cir.) *cert. denied* 479 U.S. 954 (1986). Fourth, an alternate who has not been discharged might be present during the deliberations of the regular jurors, even though the alternate is never made a regular juror and is not charged with responsibility for deciding the case. *See, e.g., United States v. Beasley*, 464 F.2d at 469.

In the present case, it was the fourth type of error which occurred; the alternate jurors were not discharged and were then allowed to be present during the deliberations of the regular jurors. This type of error is different, and more prejudicial, than the other types of Rule 24(c) error, because it results in a violation of the jealously guarded sanctity of juror deliberations. *See United States v. Watson*, 669 F.2d 1374, 1390-91 (11th Cir. 1982); *United States v. Phillips*, 664 F.2d 971, 995 (5th Cir. 1981) (discussing *United States v. Lamb*, 529 F.2d 1153, 1160 (9th Cir. 1975) (*en banc*) (Wright, J. dissenting).

B. There Is No Conflict Among The Circuits Once The Cases Are Examined According To The Type Of Rule 24(c) Error

In making its "conflict among the circuits" claim, the government groups together cases from all four categories into one category. Gov't. Pet. at 7-9, *citing, inter alia, United States v. Reed*, 790 F.2d at 209-10 (alternate juror not discharged and made into a regular juror, thereby resulting in a 13 person jury); *United States v. Kaminski*, 692 F.2d at 518 (at request of defense, alternate not discharged and later substituted in as regular juror with personal consent of each defendant); *United States v. Phillips*, 664 F.2d at 990 (alternate juror not discharged and held separately from other regular jurors until later substituted in as regular juror).

What the government fails to recognize, however, is that the question of whether a "Rule 24(c) violation is reversible error per se" is *not* a function of the circuit where the case is decided, but rather the type of error.

The court of appeals in this case did not reverse simply because there was a violation of Rule 24(c); the unanimous panel reversed because at least one of the alternate jurors was allowed in on the deliberations from start to finish.[7] Those deliberations should have been private and secret among those persons who were to be held accountable for, and were morally responsible for, deciding the defendants' fate.

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[7] One of the two alternates asked to be excused during the deliberations and was apparently permitted to leave.

None of the cases cited by the government to be in conflict with this holding involve this type of Rule 24(c) violation.[8] That different courts have ordered different remedies for different types of Rule 24(c) errors does not mean that there is a conflict among the circuits; rather, any claimed conflict is the result of the failure to properly categorize different cases. Indeed, while the government attributes to the Ninth Circuit a rule of automatic reversal for Rule 24(c) violations (Gov't Pet. at 9), the Ninth Circuit does not require reversal where Rule 24(c) is violated but the alternates are not allowed in the jury room during deliberations. *See United States v. Rubio*, 727 F.2d at 799.

The government's claimed conflict is manufactured, as part of a thinly veiled attempt to have a case that would otherwise be considered routine, turned into a "cert worthy" case so the government can avoid an embarrassing loss. Legal analysis, not review by this Court, is needed to resolve the conflict presented by the government.

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[8] The government does cite two cases in which alternate jurors were not discharged and were allowed in the jury room during deliberations and were not later substituted as regular jurors. *See United States v. Jones*, 763 F.2d 518 (2d Cir.) *cert. denied* 474 U.S. 981 (1985); *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982). In each of those cases, however, the alternate jurors remained in the jury room for only a short period of time before they were ordered removed (an hour and a half in *Jones*, 763 F.2d at 522, and thirty five minutes in *Watson*, 669 F.2d at 1389). In contrast, in the present case, one of the alternates remained with the regular jurors throughout the deliberations until the verdict was reached.

IV. THE COURT OF APPEALS DECISION TO REVERSE WITHOUT REQUIRING THE DEFENDANTS TO PROVE ACTUAL PREJUDICE WAS CORRECT; THE DECISION IS CONSISTENT WITH THE PRINCIPLE THAT A DEFENDANT SHOULD NOT BE REQUIRED TO SHOW PREJUDICE WHERE THE NATURE OF THE ERROR MAKES SUCH A SHOWING IMPOSSIBLE

The government argues that review should be granted because the court of appeals' decision ordered a reversal without a showing of prejudice "and there are very few errors that should result in automatic reversal of a criminal conviction absent a showing of prejudice to the defendant." Gov't. Pet. at 9 (citations omitted). In asserting that the error here was of a type for which automatic reversal is inappropriate, however, the government relies on a "straw man" argument – it says the error involved jury size and then explains how such an error cannot be inherently prejudicial. The court of appeals' decision to reverse without requiring a showing of prejudice, however, was not based on jury size. The error which warranted automatic reversal was the intrusion of the privacy of the jurors and the secrecy of their deliberations by persons who were not held accountable for the decision to be made. Since it is impossible to show prejudice from this indisputably serious error, it is precisely the type of error for which this Court has recognized a per se reversal is appropriate.

A. The Error Requiring Reversal Without A Showing Of Prejudice Was Not A Violation Of The "Rule of 12" But A Violation Of The Privacy And Secrecy Of The Deliberating Jurors

The government, in criticizing the court of appeals' decision for reversing without a showing of prejudice, attempts to make it appear that the court did so based on a violation of the "rule of 12" (i.e., the jury must be comprised of 12 persons, neither more nor less). *See* Gov't. Pet. of 10-11. The government first notes that the court of appeals, in characterizing the error as "inherently prejudicial" and one which "infringes upon the substantial rights of the defendant," cited to the Fourth Circuit's decision in *United States v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964). *See* Gov't Pet. at 10. The government then focuses on that part of the opinion in *Virginia Erection* which expressed the view that the Constitution requires a jury of 12 persons in criminal cases, "neither more nor less." 335 F.2d at 870.

Having thus linked the court of appeals' characterization of the error in this case as "inherently prejudicial" with the rule of 12 principle discussed in *Virginia Erection*, the government proceeds to point out that the Constitution is no longer read as requiring a jury of twelve. Gov't Pet. at 10-11, *citing, inter alia, Williams v. Florida*, 399 U.S. 78 (1970). The government completes its criticism of the court of appeals' automatic reversal by asserting that since a violation of the rule of 12 does not violate a "substantial right" of the defendants, such a violation cannot be inherently prejudicial and cannot support a reversal without a showing of prejudice.

The government's observations about the rule of 12 principle are correct, but they are also irrelevant. The court of appeals did not cite to the *Virginia Erection* opinion for the proposition that a jury must be 12 persons, but rather the opinion's explicit recognition in that case of "the cardinal principle that the deliberations of the jury shall remain private and secret in every case." Pet. App. at 28a, *quoting Virginia Erection, supra,* and Fed. R. Crim. P. 23(b) (1990 ed.) (Advisory Committee Notes to 1983 Amendment. It was this error – the intrusion upon the "jury's privacy and the secrecy of the jury process" – which the court of appeals ruled justified reversal without a showing of prejudice, and not the straw-man rule of 12 error. Pet. App. at 28a.

B. The Nature Of The Error Makes It Impossible To Prove Prejudice And Therefore The Court Of Appeals Decision To Reverse Without Requiring The Defendants To Establish Prejudice Is Appropriate And Consistent With The Decisions Of This Court

Once it is recognized that the decision to reverse without a showing of prejudice was based on the jury deliberation error, and not as the government suggests, a jury size error, the government's argument that the decision is inconsistent with this Court's pronouncements on per se reversible error is without support.

There is no dispute that allowing the alternates to be present during the deliberations of the regular jurors was a flat-out violation of Rule 24(c) of the worst sort. Nor can there be any reasonable dispute that this error is potentially prejudicial. As the court of appeals correctly

recognized, and as other courts have recognized previously, a violation of the jury's privacy and the secrecy of its deliberations by the presence of persons not assigned responsibility for deciding the case, can have numerous, even if sometimes subtle, effects on the jurors' deliberations and ultimate decision. *See* Pet. App. at 29a; *United States v. Lamb,* 529 F.2d 1153, 1160 (9th Cir. 1975) (*en banc*) (Wright, J., dissenting); *Virginia Erection,* 335 F.2d at 872; *see also* Fed. R. Crim. P. Rule 23(b) (1990 ed.) (Advisory Committee Notes to 1983 amendment). Certainly there is no basis for assuming that the error had no effect.[9]

While prejudice is virtually inevitable, it is not possible for a defendant to demonstrate, or for a court to determine, whether the presence of unauthorized persons during deliberations had an effect on the jury and if that effect were prejudicial. To make such a determination would require exactly the type of intrusive post-verdict interrogation of jurors which has been eschewed by the federal courts. *See Tanner v. United States,* 483 U.S. 107 (1987).

The inability to prove actual prejudice does not mean the error should be overlooked or disregarded. To the

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[9] The government argues that it is possible to assume there was no prejudice because there is no difference between alternate and regular jurors. Gov't Pet. at 13. The error here, however, was not vitiated by the fact that the unauthorized persons present during deliberations were alternate jurors – the alternate jurors were not charged with the solemn responsibility of deciding the defendants' fate and were not made accountable for the decision made. The poll of the jury at the return of the verdicts did not include the alternates. TR: 10822-10823.

contrary, this Court has recognized that where an error is of a type that makes it difficult for the defendant to demonstrate actual prejudice, in the usual requirements for proving prejudice should not apply. *See Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *see also, Strickland v. Washington*, 466 U.S. 668, 692 (1984) (discussing when proof of prejudice may not be required). This same principle has been applied to other errors which occur during jury deliberations. *See United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979) (where extrinsic material is available to jurors during deliberations, reversal is required unless "it can be concluded beyond a reasonable doubt that [the] extrinsic evidence did not contribute to the verdict.").

The defendant agrees with the government that the types of errors which warrant reversal without a showing of actual prejudice have been narrowly limited by this Court. A violation of the rule of 12 is not such an error; a violation of the privacy of jurors and the secrecy of their deliberations through the presence of unauthorized persons from the beginning of the deliberations until the end, is such an error.

V. THE COURT OF APPEALS CORRECTLY RULED THAT PERSONAL CONSENT OF THE DEFENDANT IS REQUIRED TO WAIVE THE RIGHT TO A JURY FREE FROM OUTSIDE INFLUENCE; PERSONAL CONSENT BY THE DEFENDANT SHOULD BE REQUIRED BECAUSE THERE IS NO TACTICAL REASON FOR GIVING UP THE RIGHT AND IT IS SIMILAR TO OTHER RIGHTS WHICH CAN ONLY BE WAIVED BY PERSONAL CONSENT OF THE DEFENDANT

The government's final point is that review should be granted because the court of appeals incorrectly ruled

that personal consent of the defendant was required to vitiate the error which occurred here.[10] Gov't pet. at 13-17. According to the government, the vast array of strategically based trial decisions are allocated to counsel and the decisions which must be made personally by the defendant are few in number. Gov't Pet. at 15-16. Thus, the government asserts that "[t]he decision to permit alternate jurors to retire with the regular jurors during deliberations is not the sort of 'fundamental' trial decision that the defendant must make personally." Gov't Pet. at 17.

Once again, the defect in the government's argument is its failure to recognize the true nature of the error which resulted in the court of appeals reversal.

Contrary to the government's assertion, the decision at issue is not whether "to permit alternate jurors to retire with regular jurors . . . " Gov't Pet. at 17. Rather, the decision is whether to give up the right to have a jury that is not subject to outside influence. It is because of the

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[10] This argument necessarily rests on the assumption that the defendants' attorneys consented to the erroneous procedure. If the attorneys did not consent, then there is no reason to reach the question of whether the personal consent of the defendants is required. As discussed above, the record provides no basis to assume that the oblique statements of the attorney for co-defendant Hilling constituted consent by other counsel, especially since Mr. Gray's counsel did object to the procedure on the one occasion he addressed the issue. *See* Section II, *supra*. Nevertheless, for purposes of responding to the government's contention that the court of appeals erred in requiring the personal consent of the defendants, it will be assumed that the attorneys consented to the erroneous procedure.

nature of this right that Rule 24(c) is stated in mandatory language, and does not even allow a waiver of the right under any circumstances. Indeed, there is no apparent benefit to be obtained by a defendant from consenting to a violation of Rule 24(c).[11] *See United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973) ("Because any benefit to be derived from deviating from the Rule is unclear, and the possibility of prejudice so great, it is foolhardy to depart from the explicit command of Rule 24.") The government's attempt to characterize this decision as a tactical one is simply unfounded. In fact, the procedure of allowing the alternates to be present during deliberations was not initiated by the defense, but rather was suggested by the district court; the procedure was suggested not because of some potential tactical advantage, but as the district judge explained it, "strictly as a matter of courtesy" to the alternate jurors. Pet. App. at 5a, n.5.

The special nature of the right also makes irrelevant the government's argument that, as a general matter, few trial strategy decisions require the personal consent of the defendant. Gov't Pet. at 15-16. Given that there is no benefit to be obtained by a defendant from consenting to a violation of Rule 24(c), it is hardly persuasive to posit that most strategical decisions are allocated to counsel and do not require the personal consent of the defendant.

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[11] Requiring the personal consent of the defendant will have the salutary effect of drastically reducing the number of Rule 24(c) violations; when it is explained to the defendant that there is nothing to be gained from consenting to a violation of Rule 24(c), it is likely that consent will not be forthcoming.

One of the decisions which require the personal, written consent of the defendant is the decision to have a jury of less than 12 decide upon a verdict. This requirement, made mandatory by Rule 23(b), has also been recognized and endorsed by the courts. *See United States v. Reyes*, 603 F.2d 69, 71 (9th Cir. 1979); *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971); *see also United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974). If the personal, written consent of the defendant is required for a jury of less than twelve, then it is appropriate to require the personal consent of the defendant to a jury that is subject to the influence of others during their deliberations.

A comparison of Rule 23(b) and Rule 24(c) provides still further support for the conclusion that a waiver of the provisions of Rule 24(c) should require the personal consent of the defendant. As noted, Rule 23(b) requires the personal consent of the defendant to have his or her case decided by a jury of less than twelve. In contrast, Rule 24(c) does not permit a waiver under any circumstances. If any logical conclusion is to be derived from this difference between Rule 23(b) and Rule 24(c), it is that an even more stringent standard of waiver should apply to Rule 24(c) errors. If one rule allows for a waiver but says that it must be made personally by the defendant in writing, and a companion rule does not allow for a waiver of its provision under any circumstances, it hardly makes sense to conclude that the second rule can be waived more easily than the first.

If personal consent of the defendant is required when a decision is made to proceed with less than 12 jurors, the same should be required when a court wants to have

alternate jurors sit in on the deliberations of the regular jurors. This is particularly true given that there is a potential benefit to the defendant from consenting to a jury of less than 12, whereas there is no benefit to be derived by a defendant from a violation of Rule 24(c). Given the absence of any strategic benefit to a defendant from consenting to a violation of the Rule, it is appropriate to require that the defendant personally consent to any such violation.

The court of appeals' conclusion that the personal consent of the defendant is required to waive the right to have a jury that is free from the presence and influence of unauthorized persons appropriately recognizes the special nature of the right at issue. Further, the court's rule will contribute dramatically to the prevention of such errors in the future, and it is consistent with the division of responsibility between counsel and client in other areas of criminal procedure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

William J. Genego,
Attorney
100 Wilshire Boulevard
Suite 1000
Santa Monica, California 90401

April, 1992

(3)

No. 91-1306

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1306

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent Gray contends (Br. in Opp. 6-8) that this case is moot because the government did not obtain a stay of the court of appeals' mandate. That contention is contrary to the firmly settled principle that the issuance of a court of appeals' mandate has no effect on the power of this Court to review the court of appeals' judgment. See, *e.g.*, *United States* v. *R.L.C.*, No. 90-1577 (Mar. 24, 1992), slip op. 3; *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581-582 n.2 (1983); *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 467 (1947); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931). The reason for that rule is that a reversal of the judgment of a lower

court by this Court serves to vacate the lower court's judgment and to nullify what was done under the mandate embodying the erroneous judgment. *Villamonte-Marquez*, 462 U.S. at 581-582 n.2. Accordingly, the issuance of the mandate by the court of appeals does not moot this case.[1]

2. Respondent Olano asserts (Br. in Opp. 3) that "at no time * * * did my counsel * * * consent" to allow the alternate jurors to observe the jury deliberations. Similarly, Gray asserts (Br. in Opp. 11) that "[t]he record simply does not support" the court of appeals' assumption that counsel for one of the defendants consented to that procedure on behalf of all defendants. In fact, the record shows that counsel for all the defendants agreed to allow the alternates to be present during the deliberations.

When the district court suggested the possibility of allowing the alternates to observe the deliberations, it stated that "if there is even one person who doesn't like it we won't do it. * * * [U]nless it's something you all agree to, it's not worth your spending time hassling about." Pet. App. 5a n.5; Tr. 10,400. Counsel for one of the defendants initially objected to the procedure. Pet. App. 5a. The next day, however, the district court addressed counsel for all the defendants as follows:

> THE COURT: Do I understand that the defendants now—it's hard to keep up with you, counsel. This is sort of a day by day—but that's all right. *You do all agree that all fourteen deliberate?*
>
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
>
> MR. KELLOGG: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

Pet. App. 6a (emphasis added).

Although Gray characterizes the district court's statement as "inexplicabl[e]," Br. in Opp. 10, it is easily explained. The district court's statement, and defense counsel's response, clearly show that counsel for all the defendants agreed that the alternates would be permitted to observe, but not participate in, the deliberations.

In any event, the court of appeals decided this case on the assumption "that co-defendant's counsel spoke as counsel for all defendants on this issue." Pet. App. 27a. The court held that, despite defense counsels' consent, respondents' convictions nevertheless had to be reversed. *Ibid.* The government is seeking review of that erroneous legal ruling.[2]

---

[1] Gray notes (Br. in Opp. 8 n.5) that in this case, unlike *Villamonte-Marquez*, the indictment has not been dismissed. That difference is irrelevant. A decision by this Court reversing the court of appeals will vacate the court of appeals' judgment and nullify any actions taken under the court of appeals' mandate. In any event, the district court has stayed further proceedings pending the disposition of the petition. See Br. in Opp. 7.

[2] Gray is incorrect in contending (Br. in Opp. 9) that our petition for a writ of certiorari rests solely on defense counsels' consent to allow the alternates into the jury room. Our basic contention is that violations of Fed. R. Crim. P. 24(c) should not be subject to a rule of automatic reversible error. We believe that principle applies whether or not the defendant has consented to the violation. The fact that the defense did not object to the violation in this case—and indeed consented to it—strengthens our argument, but it does not provide the only basis for review by this Court.

3. Both respondents contend that the court of appeals' decision in this case does not conflict with any decision of another court of appeals. That contention is unpersuasive.

Olano contends (Br. in Opp. 7) that the cases cited in our petition are distinguishable because one of the alternates in this case "did not stay with the jury throughout their deliberations, but instead after one day of deliberations broke up the sanctity of the jury room by leaving and being excused." Olano asserts that in all of the cases we cited "the alternates remained with the twelve jurors until a decision was rendered." *Ibid.* It is not clear why that distinction should matter, but in any event Olano's assertion about the other cases is incorrect. Our petition cites several cases in which courts of appeals declined to apply a rule of automatic reversible error even though the alternates did not remain with the jury throughout the deliberations. See Pet. 7-9 (citing *United States* v. *Jones*, 763 F.2d 518, 523 (2d Cir.) (alternates retired with jury to observe deliberations but were discharged before deliberations were completed), cert. denied, 474 U.S. 981 (1985); *United States* v. *Watson*, 669 F.2d 1374 (11th Cir. 1982) (alternate retired with jury and was elected foreman, but was discharged before deliberations were completed); *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981) (alternate replaced juror after deliberations began), cert. denied, 457 U.S. 1136 (1982).[3]

[3] There is no force to Olano's argument (Br. in Opp. 8-9) that the Constitution requires that a jury consist of 12 persons, and only 12. In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court rejected the contention that the Sixth Amendment guarantee of a trial by jury necessarily requires a trial by exactly 12 persons. The Court concluded that the fact that a jury consisted of 12 members at common law "is a historical accident * * * wholly without significance 'except to mystics.'" *Id.* at 102 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). See also *Colegrove* v. *Battin*, 413 U.S. 149 (1973) (Seventh Amendment right to jury trial does not encompass a right to a 12-member jury).

Gray contends (Br. in Opp. 12-15) that we have "manufactured" a circuit conflict by lumping this case together with cases involving other types of violations of Fed. R. Crim. P. 24(c) that do not result in a violation of the secrecy of jury deliberations, such as allowing an alternate to participate in the deliberations as a thirteenth juror, or substituting an alternate juror for a regular juror after deliberations have begun. But as Gray himself concedes (Br. in Opp. 15 n.8), our petition cites cases involving precisely the same type of violation that occurred in this case, in which the court of appeals nevertheless refused to apply a rule of automatic reversible error. See *United States* v. *Jones*, *supra*; *United States* v. *Watson*, *supra*. See also *Johnson* v. *Duckworth*, 650 F.2d 122 (7th Cir. 1981); *United States* v. *Allison*, 481 F.2d 468 (automatic reversal not required where alternate was instructed to observe but not participate in deliberations), aff'd after remand, 487 F.2d 339 (5th Cir. 1973), cert. denied, 416 U.S. 982 (1974). Gray attempts to distinguish *Jones* and *Watson* on the ground that the alternate was in the jury room for only an hour and a half in one case, and 35 minutes in the other. But he provides no reason to create a rule of automatic reversal only if the alternate observes all of the jury's deliberations. Nor is there any force to his contention (Br. in Opp. 13) that the violation in this case was "different, and more prejudicial, than the other types of Rule 24(c) error." An alternate who actually participates in the jury's deliberations and

casts a vote for acquittal or conviction is more likely to prejudice the defendant than an alternate who silently observes the deliberations. Because the presence of alternates in the jury room is not inherently prejudicial to the defendants, there should be no requirement of automatic reversal in the case of such an error.

4. In support of their claim that the error in this case requires automatic reversal, respondents contend (Olano Br. in Opp. 10-11; Gray Br. in Opp. 16-20) that the presence of alternates in the jury room may have subtle effects on the jurors' deliberations and that it is difficult or impossible for defendants to demonstrate those effects. Respondents, however, overstate both the likelihood of prejudice and the difficulty of proving it. There is no reason to suppose that alternate jurors will disregard the court's instructions not to participate in the deliberations. Any effects on the jury caused by the silent presence of the alternates are likely to be quite minor, and are as likely to favor the defendant as the government. If a defendant nevertheless believes that he may have been prejudiced, the district court has authority to determine "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). See *Tanner* v. *United States*, 483 U.S. 107 (1987).[4]

Even if violations of Fed. R. Crim. P. 24(c) were not subject to harmless error analysis because of the perceived difficulty of proving prejudice, it would not follow that such violations rise to the level of plain error. The plain error rule protects the process of adjudication at trial by requiring a defendant to make his wishes known with respect to a particular ruling, while at the same time protecting against the risk that a defendant will be unjustly convicted because of a serious default on the part of his attorney. The technical error in this case did not approach the type of "egregious error[]" that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" or results in a miscarriage of justice. *United States* v. *Young*, 470 U.S. 1, 15 (1985). Accordingly, the court of appeals erred in treating the violation in this case as plain error.[5]

5. Finally, Gray contends (Br. in Opp. 20-24) that defense counsel cannot waive a defendant's objection to a violation of Rule 24(c). Gray makes no effort to

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[4] In an analogous situation, where the district court exercises its discretion to substitute an alternate juror for a regular juror, the defendant is not entitled to reversal absent a showing of prejudice. *United States* v. *Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986); *United States* v. *Dumas*, 658 F.2d 411, 413 (5th Cir. 1981), cert. denied, 455 U.S. 990 (1982).

[5] Contrary to Olano's contention (Br. in Opp. 10-11), *United States* v. *Essex*, 734 F.2d 832 (D.C. Cir. 1984), does not support the proposition that it is "plain error for the trial court to permit the alternate juror to retire to the jury room for deliberations." In *Essex*, a juror failed to appear after jury deliberations had been adjourned for the weekend. The court of appeals concluded that the district court committed plain error by allowing the remaining 11 members of the jury to continue deliberations without making any effort to find the missing juror or determine whether there was any reason to excuse him. *Id.* at 834-835.

Olano also cites a superseded edition of Professor Wright's treatise for the proposition that "it is reversible error, even though the defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate." Br. in Opp. 9 (quoting 2 C. Wright, *Federal Practice and Procedure* § 388, at 52 (1969)). The current version of that treatise omits that statement and instead discusses the court of appeals' decisions that have refused to apply a rule of automatic reversal. See 2 C. Wright, *Federal Practice and Procedure* § 388, at 391 nn.23, 24 (2d ed. 1982 & Supp. 1992).

demonstrate that the technical violation of Fed. R. Crim. P. 24(c) at issue in this case involved the kind of basic right that can be waived only by the defendant himself. Instead, he asserts that the decision to allow alternates into the jury room was not a matter of trial tactics because "there is no apparent benefit to be obtained by a defendant from consenting to a violation of Rule 24(c)." Br. in Opp. 22. But defense counsel might well conclude that there is a tactical benefit to be gained from consenting to such a procedure. For example, defense counsel might conclude that a larger jury is less likely to convict than a smaller jury, or that the alternates in a particular case are likely to favor the defendant. Defense counsel's decision to allow the alternates into the jury room was not the sort of fundamental trial decision that the defendant must make personally. See generally *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988).[6]

Gray also contends (Br. in Opp. 23) that because "the personal, written consent of the defendant is required for a jury of less than twelve" under Fed. R. Crim. P. 23(b), it is "appropriate to require the personal consent of the defendant to a jury that is subject to the influence of others during their deliberations." In fact, Rule 23(b) does not require the consent of the defendant if the court finds it necessary to excuse a juror for cause after the jury has begun deliberations. In any event, the question in this case is not whether

[6] Olano cites (Br. in Opp. 9) this Court's decision in *Patton* v. *United States*, 281 U.S. 276 (1930), for the proposition that only the defendant himself can waive objection to a violation of Rule 24(c). In *Patton*, however, the Court concluded that a waiver of the right to trial by a jury of 12 "in substance amount[s] to the same thing" as a waiver of the right to trial by jury. 281 U.S. at 290. The Court subsequently rejected that view. See *Williams* v. *Florida*, 399 U.S. 78, 100-102 (1970).

the procedure at trial complied with the requirements of the Federal Rules of Criminal Procedure, but whether the violation of Rule 24(c) requires automatic reversal. In analogous cases involving technical violations of Fed. R. Crim. P. 23(b), the courts of appeals have held that reversal is not required absent a showing of prejudice. See, *e.g.*, *United States* v. *Fisher*, 912 F.2d 728, 731-733 (4th Cir. 1990) (oral consent rather than consent in writing), cert. denied, 111 S. Ct. 2019 (1991); *United States* v. *Smith*, 523 F.2d 788, 791 (5th Cir. 1975) (same), cert. denied, 424 U.S. 973 (1976); *United States* v. *Spiegel*, 604 F.2d 961, 965 (5th Cir. 1979) (defense counsel, rather than defendant, stipulated to a jury of less than 12), cert. denied, 446 U.S. 935 (1980); *United States* v. *Roby*, 592 F.2d 406 (8th Cir.) (same), cert. denied, 442 U.S. 944 (1979).[7]

[7] Gray contends (Br. in Opp. 3, 5-6 & n.3) that respondents have raised other "substantial" issues that "will inevitably result in a reversal and new trial" even if this Court grants the petition and reverses the decision of the court of appeals. The short answer to that contention is that the court of appeals did not consider those additional issues and they are therefore not before this Court. Moreover, Gray's discussion of the other issues raised in the court of appeals is one-sided. For example, he states (Br. in Opp. 5-6) that "one of the jurors was inexcusably absent during an afternoon of the trial but yet the district court allowed the trial to continue." In fact, the juror was not "inexcusably" absent, but instead became ill during the luncheon recess on the 28th day of trial. Counsel for the defendants discussed the situation and agreed to continue with the testimony in spite of the juror's absence. The juror returned the next morning and, as agreed by counsel, was provided with a transcript of the prior afternoon's proceedings. See R. 6,247; Olano Gov't C.A. Br. 25.

For the foregoing reasons, and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

APRIL 1992

(5)

No. 91-1306

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR. AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

GUY W. OLANO, JR., *PRO SE*
P.O. Box 55494
Metairie, LA 70005
(504) 835-4909

WILLIAM J. GENEGO
100 Wilshire Blvd.
Ste. 1000
Santa Monica, CA 90401
(310) 394-5802
Counsel for Respondents

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioner

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JOINT APPENDIX

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[1] The opinion, order denying rehearing and rehearing en banc, and judgment of the court of appeals are printed in the appendix to the petition for a writ of certiorari, and have not been reproduced here.

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

CR86-202R

U.S.

vs.

JOSEPH S. ASCANI, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1986		
Jul 22	1	COMPLAINT as to Defs *MANSOUR* & *McCUIN*
July 24	2	INDICTMENT as to all Defs
		• • • • •
Aug 7	14	ENT (PKS) ARRAIGNMENT: All Defs. except *McCUIN*–S-831 & 832 AUSA S. Dohrmann; Def Cnsls.: D. Foret for *ASCANI*, K. Robison for *GRAY*, R. Whalen for *KALTERMAN*, D. Dubitzky for *MANSOUR*, K. Pflaumer for *MARLER*, B. Wefald for *NEUBAUER* & R. Capitelli for *OLANO*. All Defs advised of charges. All pleads NOT GUILTY to all Cts. charged. Def *MARLER*'s FA placed UNDER SEAL. Def *KALTERMAN* to obtain Local Cnsl ASAP. Trial set 10-14-86 9:30 (BJR) for all Defs. Pret. Conf. set 9-5-86, 10:00 a.m. Pret. MOs due 8-28-86. Bond set @PR for all

DATE	NR	PROCEEDINGS
		Defs. Def *MANSOUR*'s bond not as previously set in LA, but Def may travel in Continent. U.S. & need not report to pret. officer in LA. Arraignment cont'd til 8-14-86 as to Defs *HILLING* to obtain Cnsl & *MANSOUR* to review Indict. All Defs advised of Rule GR (2)
		• • • • •
Aug 14	26	ENT (PKS) ARRAIGNMENT: (cont'd) Def *HILLING* AUSA B. Westinghouse; Def Cnsl T. Kellogg; S-836. Def Cnsl appointed. Def pleads NOT GUILTY to all Cts. Trial set 10-6-86, 9:30 (BJR) Pret. MOs due 8-28-86
Aug 14	27	ENT (PKS) ARRAIGNMENT: (cont'd) Def *MANSOUR* AUSA B. Westinghouse; Def Cnsl J. Zulauf; S-836 Def advised of charges. Def pleads NOT GUILTY to Cts. 2-5, 10-14. Trial set 10-14-86, 9:30 (BJR) Pret. MOs due 8-28-86. Bond remains in effect Pret. conf. set 9-5-86, 10:00 a.m. Status conf. re Cnsl set 8-26-86, 1:30 (PKS) unless Cnsl notifies Clerk
		• • • • •
Oct 20	250	ENT (BJR) HRG.: on Def *OLANO*'s request to represent pro se: AUSA T. Wales/B. Westinghouse; Def Cnsl K. Kanev; CR J. Roth. Court finds Def in need of Cnsl both in Louisiana & this district & Orders Cnsl to be appointed. Def remanded. Cc & Ent. 10-28-86

DATE	NR	PROCEEDINGS
		• • • • •
Nov 20	309	ORDER (BJR) that Def *OLANO* shall file w/Court: Financial Affidavit; supple affidavit identifying circumstances re: retainer of Cnsl in E.D. of NO & explaining whether Def can retain Cnsl in this case; affidavits to be Sealed by Clerk, for review only by Court/order of court. Court will determine eligibility re: app't of Cnsl.
Nov. 20	311	ORDER (BJR) Appointing Cnsl for Def *OLANO*
		• • • • •
Dec 8	336	SUPERSEDING INDICTMENT as to All Defs
		• • • • •
Dec 17	365	ENT (PKS) ARRAIGNMENT: Def *MARLER* AUSA B. Westinghouse; Def Cnasl A. Bentley: S-870. Def advised of charges. Def pleads NOT GUILTY to Cts. I-III & VII. Trial set 2-23-87 (BJR)
Dec 17	366	ENT (PKS) ARRAIGNMENT: Def *HILLING* ASUA B. Westinghouse: Def Cnsl T. Kellogg; S-870. Def adv. of charges. Def pleads NOT GUILTY to Cts. I-III. Trial set 2-23-87 (BJR)
Dec 18	367	ENT (PKS) ARRAIGNMENT: Def *McCUIN* AUSA S. Dohrmann: Def Cnsl F. Leatherman: S-870. Def advised of charges. Def pleads NOT

DATE	NR	PROCEEDINGS
		GUILTY to Cts. 1-17. Trial set 2/23/87 9:30 (BJR)
Dec 18	368	ENT (PKS) ARRAIGNMENT: Def *GRAY* AUSA S. Dohrmann; Def Cnsl J. Wolfe: S-870. Def advised of charges. Def pleads NOT GUILTY to Cts. 1-8. Trial set 2-23-87, 9:30 (BJR)
		• • • • •
1987		
Jan 9	390	WAIVER of Def *OLANO* of Arraignment on Supers. Indict.
		• • • • •
Feb 5	421	ENT (BJR) PRETRIAL CONFERENCE: AUSA R. Westinghouse/T. Wales; Def Cnsls. M. Frost, J. Wolfe, T. Kellogg, B. Wefald, A. Bentley & J. Rawls: CR J. Roth. Cnsl will atteampt to stip. as to Cust. test. Parties to provide 24 hr. notice as to witnesses. Gov't will be allowed 11 peremp. challenges; Defs will have 18. Each side will reserve 1 challenge. In event 1 of jurors has already been excused by conclusion of trial, court will decide which one of remain. 13 jurors to excuse. Jurors will be allowed to take notes. Defs will file joint voir dire & Mtns. in limine. Jury instruct. to be filed no later than 4-9-87. Cnsl to discuss preferences as to photo ID of witnesses & notify court of decision. In Chambers: Court Grants Defs' request for 1 week cont. of trial. Trial

DATE	NR	PROCEEDINGS
		to commence 3-2-87, 9:30 a.m. Cc & Ent. 2-6-87
		• • • • •
Feb 26	453	VOIR DIRE of Defs
		• • • • •
Mar 2	460	VOIR DIRE of Plf.
		• • • • •
Mar 2	464	ENT (BJR) FIRST DAY OF JURY TRIAL
		• • • • •
May 28	649	ENT (BJR) FORTY-SEVENTH DAY OF JURY TRIAL: Defs & Cnsl persent. CR V. Sorensen. Def *NEUBAUER*'s Cnsl absent w/permission. Defs *MARLER* & *GRAY* present clos. arg. Gov't presents rebutt. clos. arg. Court gives jury final instructions before delib. Peremptory challenges. Jury to resume 5-29-87, 9:00 a.m.
		• • • • •
*May 29	684	ENT (BJR) Alternate juror N. Sargent asks to be excused, GRANTED
Jun 3	685	ENT (BJR) VERDICT: Defs & Cnsl absent upon permission. Jury returns verdict: – Def *ASCANI*, NOT GUILTY as to Cts. I, II, III, IV & IX – Def *GRAY*, GUILTY as to Cts. I, II, III, IV, V, VI, VII, & VIII – Def *HILLING*, GUILTY as to Cts. I, NOT GUILTY as to Cts. II & III

DATE	NR	PROCEEDINGS
		– Def *KALTERMAN*, NOT GUILTY as to Cts. I, II, & III
		– Def *MARLER*, NOT GUILTY as to Cts. I, II, III & VII
		– Def *NEUBAUER*, GUILTY as to Ct. 1, NOT GUILTY as to Cts. II & III
		– Def *OLANO*, GUILTY as to Cts. I, II, III, IV, VI, VIII & IX
		Court orders bail revoked as to Def *OLANO*. Sent. set 7-24-87, 9:30 a.m.
Jun 3	686	VERDICT as to Def *GRAY*
Jun 3	687	VERDICT as to Def *HILLING*
Jun 3	688	VERDICT as to Def *NEUBAUER*
Jun 3	689	VERDICT as to Def *ASCANI*
Jun 3	690	VERDICT as to Def *MARLER*
Jun 3	691	VERDICT as to Def *KALTERMAN*
Jun 3	692	VERDICT as to Def *OLANO*
		• • • • •
Jun 16	730	ORDER (BJR) DENYING Defs *HILLING, NEUBAUER, GRAY & OLANO*'s Mtn for Judmnt of Acquit. & Def *GRAY*'s renewed Mtn for Judgmnt of Acquit. Defs *ASCANI, MARLER & KALTERMAN*'s pending Mtns Stricken as moot. Cc & Ent. 6-17-87
		• • • • •
Sep 25	815	ENT (BJR) Def *GRAY* fails to appear for sentencing. Gov't Mtn for Issuance of B/W GRANTED, Issd.
		• • • • •

DATE	NR	PROCEEDINGS
Sep 25	827	ENT (BJR) SENTENCING: Def *OLANO* AUSA R. Westinghouse/T. Wales: Def Cnsl K. Kanev: CR J. Roth.
		Cts. I, IV, & VI – 5 yrs. jail as to each Ct., consecutively to each other & to sent. imposed in Louisiana
		Ct. VIII – 5 yrs. jail concurrent. w/ sent. of Cts. I, IV, VI, & VIII
		Ct. IX – 2 yrs. jail concurrent. w/sent. of Cts. I, IV, VI, & VIII
		Ct. III – Imp. of Sent. Susp.: 5 yrs. Prob.
		Def to be held jointly & severally liable for full restitution amount w/other convicted co-defs. Cnsl to agree to rest. figure. Def's Mtns to strike portions of present. report & for sent. purs. to 18:4205(b)(2) DENIED. Def's Mtn for incarceration @Egland GRANTED. Def advised of right to appeal.
		• • • • •
Sep 30	**	Lodged Notice of Appeal as to Def *OLANO*
		• • • • •
Apr 22	999	ENT (BJR) SENTENCING: Def *GRAY* AUSA R. Westinghouse/T. Wales: Def Cnsl W. Genego: CR V. Sorensen. Court GRANTS Def's Mtn to shorten time to hr. Mtn to amend present. report. Mtn to amend DENIED. court hrs. from Cnsl

DATE	NR	PROCEEDINGS
		15 yrs. jail; Full Restitut. in amount to be determined; $50 mand. assessm. as to Ct. 1 & Cnsl will stipulate to assessm. per Ct.: Prob. period to be assigned purs. to distribution of 15-yr. incarc.
		Def advised of right to appeal. Def Cnsl to submit brief re: restitut. by 5-6-88. Def's Mtn for court recommend. to serve sent. in California institut. GRANTED.
		* * * * *
May 4	1018	NOTICE OF APPEAL Def *GRAY* #88-3096
		* * * * *

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 87-3128, 88-3096 and 88-3295

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GUY W. OLANO, JR., DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAYMOND M. GRAY, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Washington

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	GENERAL DOCKET FOR Ninth Circuit Court of Appeals
Court of Appeals Docket #: 88-3096	Filed: 5/11/88
	USA v. Gray
Appeal from: Western District of Washington (Seattle)	
5/11/88	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
5/11/88	Received notification from District Court of payment of docket fee (date paid: 5/6/88) [88-3096] (dmf) [88-3096]
	* * * * *

DATE	PROCEEDINGS
12/29/88	Filed motion of Appellee to consolidate cases 88-3152, 88-3153 and deputy clerk order: (Deputy Clerk: AHH) the Government's motion to consolidate appeal Nos. 88-3152 and 88-3153 is construed as a motion to have them calendared together. Construed as such the motion is granted. [1546338-1] in 88-3152, 88-3153 [88-3152, 88-3153] (mt) [88-3152 88-3153]
	* * * * *
1/27/89	Filed certificate of record on appeal. RT filed in DC 3/14/88 and 6/23/88. [88-3295] (mt) [88-3295]
	* * * * *
2/23/89	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN NINE VOLUMES OF PLEADINGS (COPIES); (filed 3/15/88) [88-3152, 88-3153] (jr) [88-3152 88-3153]
	* * * * *
3/3/89	Filed motion of aplt in 88-3295 for stay of briefing schedule and deputy clerk order: (Deputy Clerk: CB) aplt's motion to stay No. 88-3295 is denied. [1572152-1] On its own motion, the court consolidates Nos. 88-3096 & 88-3295. Briefing shall be governed by the 3/1/89 order. (Motion recvd 2/27/89) [88-3096, 88-3295] (jr) [88-3096 88-3295]
	* * * * *
5/25/89	Filed original and 15 copies Appellant Raymond M. Gray opening brief 50 pages, and

DATE	PROCEEDINGS
	five excerpts of record in 1 volumes; served on 5/22/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]
	* * * * *
7/7/89	Filed original and 15 copies appellee USA's 50 pages brief, 0 Exc. vols: ; served on 7/3/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]
	* * * * *
7/20/89	Filed original and 15 copies Raymond M. Gray's reply brief, 25 pages, served on 7/19/89 [88-3096, 88,3295] (mt) [88-3096 88-3295]
	* * * * *
1/12/90	CALENDARED: SE 3/5/90 1:30 p.m. [88-3096, 88-3295] (rk) [88-3096 88-3295]
	* * * * *
3/5/90	ARGUED AND SUBMITTED TO: WRIGHT, REINHARDT, O'SCANNLAIN [88-3096, 88-3295] (jlc) [88-3096 88-3295]
3/7/90	Filed order (Deputy Clerk: JLC) Submission is vacated pending further order of the court. [88-3096, 88-3295] (dmf) [88-3096 88-3295]
	* * * * *
9/19/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN,): We vacated submission in these cases so that #87-3128 could be remanded to the DC for the limited purpose of allowing Judge Rothstein to rule on Olano's motion for a modification of his sentence. Judge Rothstein granted that motion on 5/14/90. We hereby resubmit both cases, and consolidate them for disposition in this court. [87-3128,

DATE	PROCEEDINGS
	88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
9/19/90	Case resubmitted on this date to WRIGHT, REINHARDT, O'SCANNLAIN. (See previous deferral of submission.) [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
	* * * * *
5/31/91	FILED OPINION: REVERSED IN PART; VACATED IN PART AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WRIGHT; REINHARDT, author; O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [88-3096] (sys) [88-3096]
6/11/91	Filed motion of aple and order: (Deputy Clerk: jvr) aple is granted extension of time until 7/15/91 to file its petition for rehearing. [1945031-1] in 87-3128, in 88-3096, in 88-3295; in 87-3128, 88-3096, 88-3295, (Motion recvd 6/10/91) [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
6/12/91	Filed Appellant Raymond M. Gray in 88-3096's opposition to (Govt's Req to Ext time for filing Rhrg Petition & RFeq for Fuling on Pending Motion for Release of Defendant on Bail Nunc Pro Tunc, served on 6/11/91 (PANEL) [88-3096, 87-3128] (mhf) [87-3128 88-3096]
6/14/91	[1950383] Filed original and 3 copies Appellant Raymond M. Gray in 88-3096 & 88-3295; petition for rehearing, (PANEL) 7 p. pages, served on 6/12/91 [88-3096, 88-3295] (mhf) [88-3096 88-3295]

DATE	PROCEEDINGS
6/20/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN,): The motion of aplt Gray filed on 5/3/91 to modify order granting personal recognizance, etc., is referred to the DC for its consideration & any action it deems appropriate. This order shall constitute a limited remand for the purpose specified above. [88-3096, 88-3295] (mhf) [88-3096 88-3295]
7/15/91	[1963283] Filed original and 40 copies Appellee's (USA) petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 7/13/91 [87-3128, 88-3096, 88-3295] (tsp) [87-3128 88-3096 88-3295]
7/19/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN,): denying petition for rehearing [1950383-1] in 88-3096, 88-3295 [88-3096, 88-3295] (mhf) [88-3096 88-3295]
7/24/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) defendants are requested to file a response to the Petition for Rehearing with Suggestion for Rehearing En banc filed 7/15/91, in the above cause. The response shall be filed with the court within 21 days from the date of this order and shall not exceed 15 pages in length. [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
8/14/91	Filed aplt's motion for an extension of time to file response to petition for rehearing & suggestion for rehearing en banc to 8/19/91;

DATE	PROCEEDINGS
	[1981337] served on 8/12/91 to (PANEL). [88-3096] [88-3096] (jr) [88-3096]
8/21/91	Filed Appellant's opposition to Aplee's petition for rehearing w/suggestion for rehearing en banc in response to court's order of 7/24/91 [1967549-1] served on 8/19/91 (PANEL & all active judges) (mhf) [88-3096 88-3295]
8/23/91	Filed order (Deputy Clerk: jc) Aplt's motion for an extension of time to file response to got's petition for rehearing g & suggestion for rehearing en banc from 8/14/91 to 8/19/91 is granted. [88-3096, 87-3128] (mhf) [87-3128 88-3096]
10/18/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [1963283-1] in 87-3128, 88-3096, 88-3295 [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
	* * * * *
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [87-3128 88-3096 88-3295]
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [88-3096 88-3295]
	* * * * *

DATE	PROCEEDINGS
6/1/92	Received notice from Supreme Court, petition for certiorari GRANTED on 05/18/92 (sm) [87-3128 88-3096]

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 88-3295 Filed: 12/14/88

USA v. Gray

Appeal from: Western District of Washington (Seattle)

12/14/88 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.

• • • • •

12/29/88 Filed motion of Appellee to consolidate cases 88-3152, 88-3153 and deputy clerk order: (Deputy Clerk: AHH) the Government's motion to consolidate appeal Nos. 88-3152 and 88-3153 is construed as a motion to have them calendared together. Construed as such the motion is granted. [1546338-1] in 88-3152, 88-3153 [88-3152, 88-3153] (mt) [88-3152 88-3153]

• • • • •

1/27/89 Filed certificate of record on appeal. RT filed in DC 3/14/88 and 6/23/88. [88-3295] (mt) [88-3295]

3/3/89 Filed motion of aplt in 88-3295 for stay of briefing schedule and deputy clerk order: (Deputy Clerk: CB) aplt's motion to stay No. 88-3295 is denied. [1572152-1] On its own motion, the court consolidates Nos. 88-3096 & 88-3295. Briefing shall be governed by the 3/1/89 order. (Motion recvd 2/27/89) [88-3096, 88-3295] (jr) [88-3096 88-3295]

DATE	PROCEEDINGS

• • • • •

5/25/89 Filed original and 15 copies Appellant Raymond M. Gray opening brief 50 pages, and five excerpts of record in 1 volumes; served on 5/22/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]

• • • • •

7/7/89 Filed original and 15 copies appellee USA's 50 pages brief, 0 Exc. vols: ; served on 7/3/89 [88-3096, 88-3295] (dmf) [88-3096 88-3295]

7/20/89 Filed original and 15 copies Raymond M. Gray's reply brief, 25 pages, served on 7/19/89 [88-3096, 88,3295] (mt) [88-3096 88-3295]

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1/12/90 CALENDARED: SE 3/5/90 1:30 p.m. [88-3096, 88-3295] (rk) [88-3096 88-3295]

• • • • •

3/5/90 ARGUED AND SUBMITTED TO: WRIGHT, REINHARDT, O'SCANNLAIN [88-3096, 88-3295] (jlc) [88-3096 88-3295]

3/7/90 Filed order (Deputy Clerk: JLC) Submission is vacated pending further order of the court. [88-3096, 88-3295] (dmf) [88-3096 88-3295]

• • • • •

9/19/90 Filed order (WRIGHT, REINHARDT, O'SCANNLAIN,): We vacated submission in these cases so that #87-3128 could be remanded to the DC for the limited purpose of allowing Judge Rothstein to rule on Olano's motion for a modification of his sentence. Judge Rothstein granted that motion on 5/14/90. We

DATE	PROCEEDINGS
	hereby resubmit both cases, and consolidate them for disposition in this court. [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
9/19/90	Case resubmitted on this date to WRIGHT, REINHARDT, O'SCANNLAIN. (See previous deferral of submission.) [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
12/7/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN): It is ordered that the motion of defendant-appellant for release on bond is granted and we remand to the DC for the limited purpose of entering an appropriate order releasing him on his personal recognizance and such other conditions as the DC judge may deem appropriate. [88-3096, 88-3295] (rv)
	* * * * *
5/31/91	FILED OPINION: REVERSED IN PART; VACATED IN PART AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WRIGHT; REINHARDT, author; O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [88-3096] (sys) [88-3096]
6/11/91	Filed motion of aple and order: (Deputy Clerk: jvr) aple is granted extension of time until 7/15/91 to file its petition for rehearing. [1945031-1] in 87-3128, in 88-3096, in 88-3295; in 87-3128, 88-3096, 88-3295, (Motion recvd 6/10/91) [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]

DATE	PROCEEDINGS
	* * * * *
6/20/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN,): The motion of aplt Gray filed on 5/3/91 to modify order granting personal recognizance, etc., is referred to the DC for its consideration & any action it deems appropriate. This order shall constitute a limited remand for the purpose specified above. [88-3096, 88-3295] (mhf) [88-3096 88-3295]
	* * * * *
7/15/91	[1963283] Filed original and 40 copies Appellee's (USA) petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 7/13/91 [87-3128, 88-3096, 88-3295] (tsp) [87-3128 88-3096 88-3295]
	* * * * *
7/24/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) defendants are requested to file a response to the Petition for Rehearing with Suggestion for Rehearing En banc filed 7/15/91, in the above cause. The response shall be filed with the court within 21 days

DATE	PROCEEDINGS
	from the date of this order and shall not exceed 15 pages in length. [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
8/21/91	Filed Appellant's opposition to Aplee's petition for rehearing w/suggestion for rehearing en banc in response to court's order of 7/24/91 [1967549-1] served on 8/19/91 (PANEL & all active judges) (mhf) [88-3096 88-3295]
10/18/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [1963283-1] in 87-3128, 88-3096, 88-3295 [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
	• • • • •
12/10/91	MANDATE ISSUED [87-3096, 88-3295] (mhf) [88-3295]
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [87-3128 88-3096 88-3295]
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [88-3096 88-3295]
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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 87-3128 Filed: 10/15/87

USA v. Olano, et al

Appeal from: Western District of Washington (Seattle)

10/15/87	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL..
	• • • • •
3/16/88	Received certificate of record. RT filed in DC 3/14/88 Late, referred to CRIMATT. [87-3128] (dmf) [87-3128]
3/24/88	Filed order (Deputy Clerk: MLM) The certificate of record is ordered filed. This order does not waive the mandatory fee reduction for any portion of the RTs delivered late. Aplt's opening brief is due 4/25/88, aplee's brief is due 5/23/88, and the optional reply brief is due 6/6/88. [87-3128] (dmf) [87-3128]
3/24/88	Filed as of 3/16/88 certificate of record on appeal. RT filed in DC 3/14/88 [87-3128] (dmf) [87-3128]

DATE	PROCEEDINGS
8/16/88	Filed, as of 05/02/88, certified record on appeal in 91 Vols. (total): 24 Clerks Rec 67 RTs (Original) [87-3121, 87-3128, 87-3123, 87-3122, 87-3131] [87-3121, 87-3128, 87-3123, 87-3122, 87-3131] (sm) [87-3121 87-3122 87-3123 87-3128 87-3131]
8/26/88	FILED, AS OF 8/15/88, CERTIFIED TRANSCRIPT OF RECORD ON APPEAL IN ONE VOLUME OF RTs (ORIGINAL). ONE BOX OF EXHIBITS (17 volumes of original transcripts). [88-3152, 88-3153] [88-3152, 88-3153] (jr) [88-3152 88-3153]
10/14/88	Filed order (Deputy Clerk: AW) for purposes of oral argument, USA v. Zaki Manour, CA No. 87-3131 is severed from the above and shall be scheduled separately on the calendar. This case, No. 87-3131 will be allotted thirty minutes per side for oral argument. Appellant Mansour's motion for submission of the appeal is Denied. The Hilling and Neubauer appeals shall be heard together as scheduled. [87-3121, 87-3123, 87-3131] (PANEL) (mt) [87-3121 87-3123, 87-3131]
12/29/88	Filed motion of Appellee to consolidate cases 88-3152, 88-3153 and deputy clerk order: (Deputy Clerk: AHH) the Government's motion to consolidate appeal Nos. 88-3152 and 88-3153 is construed as a motion to have them calendared together. Construed as such the motion is granted. [1546338-1] in 88-3152, 88-3153 [88-3152, 88-3153] (mt) [88-3152 88-3153]

DATE	PROCEEDINGS
	* * * * *
1/27/89	Filed certificate of record on appeal. RT filed in DC 3/14/88 and 6/23/88. [88-3295] (mt) [88-3295]
2/23/89	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN NINE VOLUMES OF PLEADINGS (COPIES); (filed 3/15/88) [88-3152, 88-3153] (jr) [88-3152 88-3153]
	* * * * *
5/5/89	Filed Appellant Guy W. Olano's motion to recall appointed counsel and to allow movant to proceed pro se and application for release and order for an appeal bond. (CRIMATT) on 5/3/89 [1602026] [87-3128] [87-3128] (mt) [87-3128]
	* * * * *
7/6/89	Received Appellant Guy W. Olano in 87-3128's brief in 4 copies of 144 pages, and 5 excerpts; oversize, copy to ProMo w/motion to file; Served on 6/30/89 [87-3128] (dmf) [87-3128]
	* * * * *
9/8/89	Filed original and 4 copies Appellant Guy W. Olano in 87-3128 opening brief 73 pages, and five excerpts of record in 1 volumes; served on 9/5/89 [87-3128] (dmf) [87-3128]

DATE	PROCEEDINGS
9/11/89	Rec'd revised index to excerpts to aplt's opening brief. (RECORDS UNIT) [87-3128] (dmf) [87-3128]
	* * * * *
11/21/89	Filed original and 15 copies appellee USA in 87-3128's 75 pages brief, ; served on 11/17/89 [87-3128] (ec) [87-3128]
	* * * * *
12/5/89	Filed original and 4 copies Guy W. Olano in 87-3128 reply brief, 19 pages, served on 11/30/89 [87-3128] (dmf) [87-3128]
12/6/89	Received original and 4 copies Appellant Guy W. Olano in 87-3128 supplemental opening brief of 4 pages, served on 12/5/89; copy to ProMo with motion to file. [87-3128] (dmf) [87-3128]
1/5/90	Filed motion of Appellant Guy W. Olano in 87-3128 file supplemental brief and deputy clerk order: (Deputy Clerk: CB) Aplt's motion to file a suppl. brief is granted. The brief rec'd 12/6/89 shall be filed. The Government may file a supp. brief in response to aplt's suppl. brief. The Government's brief shall not exceed 5 pages in length and shall be due 2/1/90. The clerk shall calendar this appeal as soon as practicable. Subject to reconsideration. [1698270-1] (Motion recvd 12/6/89) [87-3128] (dmf) [87-3128]
1/5/90	Filed original and 4 copies Appellant Guy W. Olano in 87-3128 supplemental brief of 4 pages, served on 12/5/89 [87-3128] (dmf) [87-3128]

DATE	PROCEEDINGS
	* * * * *
1/12/90	CALENDARED: SE 3/5/90 1:30 p.m. [87-3128] (rk) [87-3128]
	* * * * *
3/5/90	SUBMITTED ON THE BRIEFS TO: WRIGHT, REINHARDT, O'SCANNLAIN [87-3128] (jlc) [87-3128]
3/7/90	Filed order (Deputy Clerk: JLC) Submission is vacated pending further order of the court. [87-3128] (dmf) [87-3128]
3/20/90	Filed order (WRIGHT, REINHARDT & O'SCANNLAIN) this case is remanded to the district court for the limited purpose of allowing the district judge to consider aplt's motion for reduction and/or modification of sentence. [1725524-1] The district court is requested to advise this panel as soon as the motion has been acted upon. [87-3128] (jr) [87-3128]
	* * * * *
9/19/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN,): We vacated submission in these cases so that #87-3128 could be remanded to the DC for the limited purpose of allowing Judge Rothstein to rule on Olano's motion for a modification of his sentence. Judge Rothstein granted that motion on 5/14/90. We hereby resubmit both cases, and consolidate them for disposition in this court. [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]

DATE	PROCEEDINGS
9/19/90	Case resubmitted on this date to WRIGHT, REINHARDT, O'SCANNLAIN. (See previous deferral of submission.) [87-3128, 88-3096, 88-3295] (rv) [87-3128 88-3096 88-3295]
11/2/90	Filed order (WRIGHT, REINHARDT, O'SCANNLAIN): It is ordered that the motion of defendant-appellant for release on bond is granted and we remand to the DC for the limited purpose of entering an appropriate order releasing him on his personal recognizance and such other conditions as the DC judge may deem appropriate. [1805544-1] [87-3128] (dmf) [87-3128]
3/22/91	FILED CERTIFIED SUPPLEMENTAL RECORD ON APPEAL IN FIVE VOLUMES. PLDGS in 3 Vols; RTs in 2 Vols. (orig record filed on 3/16/88). RECORD NOW IN 96 VOLUMES. [87-3128] (jr) [87-3128]
5/31/91	FILED OPINION: REVERSED IN PART; VACATED IN PART AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. WRIGHT; REINHARDT, author; O'SCANNLAIN.) FILED AND ENTERED JUDGMENT. [88-3096] (sys) [88-3096]
	* * * * *
6/11/91	Filed motion of aple and order: (Deputy Clerk: jvr) aple is granted extension of time until 7/15/91 to file its petition for rehearing. [1945031-1] in 87-3128, in 88-3096, in 88-3295;

DATE	PROCEEDINGS
	in 87-3128, 88-3096, 88-3295, (Motion recvd 6/10/91) [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
	* * * * *
7/15/91	[1963283] Filed original and 40 copies Appellee's (USA) petition for rehearing with suggestion for rehearing en banc. (PANEL AND ALL ACTIVE JUDGES) 15 p.pages, served on 7/13/91 [87-3128, 88-3096, 88-3295] (tsp) [87-3128 88-3096 88-3295]
7/24/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) defendants are requested to file a response to the Petition for Rehearing with Suggestion for Rehearing En banc filed 7/15/91, in the above cause. The response shall be filed with the court within 21 days from the date of this order and shall not exceed 15 pages in length. [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]
8/14/91	Filed Appellant Guy W. Olano in 87-3128's response to petition opposing petition for en-banc rehearing [1963283-1] served on 8/12/91 (PANEL & ALL ACTIVE JUDGES). [87-3128] (mt) [87-3128]
	* * * * *
10/18/91	Filed order (Eugene A. WRIGHT, Stephen R. REINHARDT & Diarmuid F. O'SCANNLAIN) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [1963283-1] in 87-3128, 88-3096, 88-3295 [87-3128, 88-3096, 88-3295] (jr) [87-3128 88-3096 88-3295]

DATE	PROCEEDINGS
	* * * * *
12/10/91	MANDATE ISSUED [87-3128, 88-3096, 88-3295] (mhf) [87-3128 88-3096 88-3295]
	* * * * *
6/1/92	Received notice from Supreme Court, petition for certiorari GRANTED on 05/18/92 (sm) [87-3128 88-3096]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR86-202R

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JOSEPH ASCANI, ET AL., DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS in the above-entitled and -numbered cause, before the Honorable Barbara J. Rothstein, United States District Court Judge, on February 5, 1987.

[2] THE CLERK: CR 86-202R, United States versus Joseph Ascani, et al. Counsel, will you please step forward and make your appearances.

MR. WESTINGHOUSE: May it please the Court, appearing on behalf of the United States Robert Westinghouse and Thomas Wales.

MR. FROST: Good morning, Your Honor, Mike Frost appearing on behalf of Mr. Ascani.

MR. WOLFE: John Wolfe and Kent Robison on behalf of Mr. Gray.

MR. BENTLEY: Al Bentley representing Brian Marler.

MR. KELLOGG: Terrence Kellogg for defendant Davy Hilling, Your Honor.

MR. WEFALD: Bob Wefald representing David Neubauer.

MR. RAWLS: Good morning, Your Honor. John Rawls from New Orleans representing Mr. Stewart Kalterman.

MR. BENTLEY: Your Honor, Mr. Kanev is not able to be here, he's on a trial in state court and I believe Mr. Wolfe will speak for him.

THE COURT: Okay.

MR. WESTINGHOUSE: Your Honor, perhaps as a means of proceeding this morning I should advise the Court that the United States and most counsel met yesterday afternoon to attempt to work out some of the pregame festivities and we have been successful in that regard as to at least some matters [3] that I would think it might be appropriate to advise the Court of at this time.

THE COURT: Why don't you because it will probably help me go down my check list and hopefully cross a number of things off.

MR. WESTINGHOUSE: All right. The first issue that we talked about was the stipulation with respect to some of the custodial witnesses that might be expected in a case of this sort. I think it's fair to say that we have reached an agreement in that regard with respect to the introduction without foundation of business records.

I should advise the Court that two counsel were not able to attend last night and so with respect to counsel for Mr. Ascani and counsel for Mr. Kalterman we do not as yet have their concurrence. But all other counsel have indicated and in fact have signed a stipulation, so it appears as though at least with respect to the majority that's in place.

THE COURT: Well, it doesn't work unless—unfortunately you don't save any time if you have to put the same witness on, so let's find out right now, Mr. Frost—yes, there you are.

MR. FROST: Yes, Your Honor. I just received a copy of the revised stipulation this morning and have not had

an opportunity to talk with my client about it or even review it. What I would propose—I'm assuming that since other counsel [4] have signed off on this that it's unlikely that there is any major prejudice to my client that would result from this, but what I would propose is that I get an answer to the Court and also to Mr. Westinghouse by Monday, if that would be permissible, in terms of the stipulation.

THE COURT: That would be fine. It will really, I think, make a tremendous difference. I think it will make a tremendous difference in the length of the trial.

Counsel, have you had a chance to review it?

MR. RAWLS: Yes, I have, Your Honor, and not to be the skunk of a lawn party, but I am going to have some real problems with that, which is based on the different nature of my client's alleged involvement in these schemes. I also can get an answer to the Court by telephone on Monday, to be followed up by written pleadings.

THE COURT: Oh, you don't have to follow it up by written pleadings, do you, counsel?

MR. RAWLS: Well, if I'm going to sign, I certainly will be following it up with a—

THE COURT: Oh, if you're going to—

MR. RAWLS: Yes, ma'am. I'm keeping the door open at this point, but I do need to confer with my client and I do have some problems with it, quite frankly.

THE COURT: Counsel, I'd like to know from you specifically—if you decide not to sign, I'm going to want to [5] know specifically on the record what your problems are and I want to know exactly what you anticipate your cross-examination of these witnesses will be, because I anticipate we're talking in a case of this nature of adding perhaps a week or two to the trial for these witnesses to arrive, and if it turns out that all of these witnesses are brought here and they take the stand and indeed you ask no questions, I just want to let you know that the Court

will take a dim view of that. That has been my experience in the past, that for custodial witnesses – in fact, with most of these witnesses it turns out that there is little or no meaningful cross-examination.

MR. RAWLS: Your Honor, that's not the way I practice law and I would not object across the board in the first place, but only to the ones affecting Alliance Federal.

Secondly, I think I have a good reason, that is, that my man as head of Alliance Service was dealing with a large volume of very big loan files and if the jury is given the misimpression that these are the only very big files that he dealt with that could be detrimental to my client.

Obviously he can testify as to that point, but if the custodial person brought in from Alliance Federal were to put these few files in the larger context of what my man was doing on a regular basis it may make a difference. That is the reason that I will object, if I do, but I honestly do not know if I'm going to object or not at this point.

[6] THE COURT: Okay. Maybe even then if you do you could find one custodial witness who could then serve you as a witness to testify as to the volume of the files and then you might –

MR. RAWLS: Yes, ma'am. As to the rest of it, telephone records and so forth, I have no objection. It's just that one particular area and I hope the Court doesn't think that I'm being frivolous in even saying what my reason is.

THE COURT: No. Now that I hear the reason I can see a good reason for it, but I also think that maybe we can narrow the scope of the objection considerably.

MR. RAWLS: What happens on the others is beyond the scope of my concern.

THE COURT: Okay.

MR. RAWLS: Thank you, ma'am.

MR. WESTINGHOUSE: Your Honor, I should preface perhaps the remainder of my statements with the

note that I think is already clear, that it applies to an agreement between all counsel who were present yesterday afternoon and both Mr. Rawls and Mr. Frost were not present. Mr. Frost, I understand, was in trial. I can't speak for Mr. Rawls.

We discussed secondly the matter of reciprocal discovery and the matter of the provision of Jencks material and Brady material. The United States and counsel agree that upon the provision from defense of reciprocal discovery or a [7] written statement that they had no reciprocal discovery or that what they were providing was all that they had the United States would then be prepared to vary from the requirements of the Jencks Act.

Specifically, we indicated the plan to provide to counsel on the Monday of the week preceding the appearance of the witnesses for that week all of the Jencks material. To make that a bit clearer we would anticipate, for instance, on Monday, February 16th, providing all Jencks material for witnesses that would be appearing during the week of February 23rd and so on through the course of the trial.

We have chosen Monday to allow ourselves the opportunity to have the weekend to prepare copies if we are behind at that time.

THE COURT: Implicit in that arrangement, of course, is that you are also providing the names of the witnesses for that week, is that correct?

MR. WESTINGHOUSE: That is correct, Your Honor.

THE COURT: I mean you'd have to be.

MR. WESTINGHOUSE: Yes.

THE COURT: And are you providing it in an order that will at least – I mean, given the trials and tribulations that occur to witness lists during trial, but it at least will follow the order that you anticipate, say, Monday, Tuesday, Wednesday, Thursday, Friday?

[8] MR. WESTINGHOUSE: We hadn't expected to do that, we had expected to provide it in alphabetical order, Your Honor, for the witnesses for the week. We certainly I don't think have any problem in giving a rough idea on the Friday afternoon or the Monday when we provide the documents as to the approximate order of witnesses.

THE COURT: Yes, again with the understanding that the vicissitudes of trial may mean changing. I think it helps everyone if the night before they can pull the documents for the witnesses that are coming on the next day and there is not this mad rush to get the relevant documents when you announce the witness. I'd expect it would be reciprocal in defendants' case going back. But rather than alphabetical order it may be more helpful to give it in a day order.

MR. WESTINGHOUSE: I don't see any problem in doing that or at least in the advising counsel as to the anticipated order of witnesses. We are certainly willing to do that. We also added to the offer to provide as Jencks material on a voluntary basis the stipulation, and that was that counsel to whom we provided the Jencks material would sign an agreement that they would not provide the Jencks material or the opportunity to review Jencks material to other counsel who had not agreed to provide us with reciprocal discovery pursuant to Rule 16. All counsel present at the meeting indicated that they were willing to abide by that restriction on our voluntary [9] production of Jencks material.

THE COURT: It sounds like such a helpful arrangement I can't imagine that Mr. Frost and Mr. Rawls wouldn't be going along with it. Is that one that you need to talk over with your clients or can you give the Court a feel for your response at this point?

MR. RAWLS: Why can't we just get it all up front? Why are we just being given it one week at a time?

THE COURT: Because they don't even have to give it to you at all, is the answer, and this is a compromise they've worked out. The Court is certainly not going to get involved in it. All I really need to know is are you and Mr. Frost going to go along with the arrangement?

MR. FROST: Sounds okay to me, Your Honor.

THE COURT: Mr. Rawls?

MR. RAWLS: Yes, ma'am.

MR. FROST: As I understand it we will have at least a weekend prior to the witnesses testifying; under the arrangement it's going to be provided seven days in advance.

THE COURT: Yes, it's the Monday of the following week, not the Monday of the week. So you'll have seven days.

MR. FROST: That week and then the weekend.

THE COURT: Yes.

MR. FROST: That's fine.

THE COURT: Okay with you, Mr. Rawls?

[10] MR. RAWLS: Yes, ma'am.

MR. WESTINGHOUSE: Your Honor, I should indicate, and I think all counsel understand, that we had intended this to be a good faith effort to make production and we pointed out because of the volume of materials there certainly may come the time when we have omitted something in that production. We will make every effort not to do that, but we did add that it's a good faith attempt to provide Jencks Act material in advance and I think everyone understood that.

THE COURT: Okay. Counsel, you know, this is meant to facilitate. If we get hung up on the mistakes that are bound to take place on both sides, it's just going to be—make the trial even more difficult than it already promises to be, and I think good faith on both sides is going to be assumed by the Court and everyone.

MR. WESTINGHOUSE: Thank you, Your Honor. The next thing we talked about were exhibits and the production of exhibits. We indicated to counsel that it is our intent to have a complete set of binders of all exhibits for each counsel and for the Court. Because of the burden of preparing those we have indicated that it may very well not be until the morning of trial or shortly, therefore, before that that we will have those ready. We have indicated we will try and have at least a rough draft of the full exhibit list available during the week before so that all counsel will have the opportunity to review [11] that and at least familiarize themselves as to the way we have set up the exhibit marking.

THE COURT: Can't quarrel with that arrangement. It sounds extremely reasonable. Of course if you do get it done earlier I'm sure they'd appreciate it earlier.

MR. WESTINGHOUSE: I understand and we will make that effort. It is we are finding a very difficult task to assemble the binders.

THE COURT: I would assume it would be given the nature of the case. I think it's probably a monumental task. Did you give any thought in this as to how the exhibits will be shown at trial? Did you reach that question?

MR. WESTINGHOUSE: We didn't talk about that. Mr. Wales and I have, however, talked about that and we envisioned that we would be making liberal use of an overhead projector with the Court's permission. In fact, we were chatting just before the Court took the Bench about an appropriate position for the projector and screen and perhaps the Court has had experience before, but one thought that we had was that perhaps the screen would be most appropriately placed toward the rear of the area just in front of the bench, set of benches and the projector then would be somewhere in the area of the far corner of the plaintiff's counsel table.

THE COURT: Sounds good. The problem with the setup of this courtroom is that it's hard to find a place where the [12] jury can see it and where opposing counsel can see it. And that seems to be—the only other alternative is to put the screen there and the projector there and—

MR. WESTINGHOUSE: The thought that we had in that regard, Your Honor, is perhaps that would be a greater interference with the jury in passing to and from the jury room. We also took note of the fact that since each counsel will have a set of their own copies of the documents it might to some extent lessen the need to look up at the screen itself because we would envison that each counsel would have the document in front of them that is being pictured on the screen.

THE COURT: No. The problem getting to and from the jury room is if you put the screen there, not there, because they go to the jury room out that way.

MR. WESTINGHOUSE: Oh, I'm sorry, I thought the jury was back there.

THE COURT: No. This is the only courtroom that has the jury room on the same floor. It's right back there.

MR. WESTINGHOUSE: Perhaps it would be most appropriate if there would be an opportunity at some point before trial that Mr. Wales and I could simply bring the screen and projector over and set it up and see what quality of picture—

THE COURT: All I ask is that you really do use the overhead projector. It's not a matter of permission from the [13] Court. It's a matter of request from the Court. I think the time involved in passing exhibits to the jury in a case like this can get substantial and really make a dent in trial time.

MR. WESTINGHOUSE: That's certainly been our practice in the past and our intent in this case, with the possible exception of somewhat voluminous documents,

where there may very well be simply a need to allow the jury to see the entire document for one reason or another. I don't think that will happen very often.

The next matter that we discussed, Your Honor, was the matter of jury selection and peremptories and I can report to the Court that at least among parties that were present we reached two agreements, subject, of course, to the Court's approval. The first of which was that counsel agreed that in terms of peremptories that it would be appropriate because of the number of defendants to ask the Court for some additional peremptories and we agreed that an appropriate number would be 17 for the defense and 10 for the United States, subject again to the two counsel who were not present.

We also agree among those that were present that all were in favor, I believe I'm representing accurately, to the simultaneous challenge to the entire panel at the conclusion of the voir dire.

THE COURT: What about alternates? Did you talk about alternates?

[14] MR. WESTINGHOUSE: We did not talk about alternates, Your Honor. I think it would be appropriate to talk in terms of perhaps three or four alternates given the potential length of trial.

THE COURT: Why don't we start with—it's not like you can get another one in the middle. How about three and take our chances? Is that all right with everyone?

MR. WEFALD: Yes.

MR. BENTLEY: Your Honor, would there be a challenge—a peremptory with respect to each of the additional alternates to be selected?

THE COURT: How about one challenge for all the alternates, move this up to 18 and 11.

MR. WESTINGHOUSE: That's fine, Your Honor.

THE COURT: Is that okay? You agreed on 17 and 10 before you discussed alternates. All I'm suggesting is 18 and 11 for the three alternates?

MR. FROST: So do we only have one peremptory challenge for all three alternates.

THE COURT: You know how we do it here. Three alternates are included—

MR. BENTLEY: That would be done at the same time that the 12 are selected and not after the 12 have been determined?

THE COURT: If it's all right with you—let me explain it, especially for those counsel who haven't gone [15] through our voir dire, the way I prefer to do it is take the whole panel and go at it as if you're choosing 15 jurors, okay, and then you'd have 18 and 11 to select 15 jurors and in fact one of the things we might discuss—you don't mind my breaking up your presentation—

MR. WESTINGHOUSE: No, Your Honor.

THE COURT: —with some of these. One of the things we might discuss is often some counsel feel there is a certain advisability to not even telling—wait a minute. Certain advantage to having 14—to having two alternates in this particular courtroom. It would be really comfortable for them to stick with the seating arrangement there. It's a chance, counsel, and I guess the thing I'd ask you is would you be willing to go with 11 if we did run through both alternates? I don't want that to be grounds—you know, it is a long trial. I don't know what we're talking about with trial now. If we get the custodial witnesses out of the picture, what is the government's estimate of their case at this point?

MR. WESTINGHOUSE: Your Honor, I think Mr. Wales and I are having some difficulty with that question.

THE COURT: Does that mean you can't agree?

MR. WESTINGHOUSE: We can't agree, that's correct. Our best estimate I think is somewhere in the neighborhood of six to seven weeks for the presentation of the United States' case.

[16] THE COURT: Well, that's better than other estimates I've heard at various times. Six to seven weeks. I think we could try two alternates, but I'd like to know if counsel would go with 11 if – or do you need time to think about it or talk to your clients about it – if we did run through two alternates and then something happened.

MR. ROBISON: Your Honor, on behalf of Mr. Gray, my name is Kent Robison, I would respectfully request that we go with 15 rather than 11 for a verdict.

THE COURT: Where are you going to put them, counsel? See, I would be willing to go with 15, too, but the problem is – the suggestion I was going to make to you is sometimes counsel feel more comfortable if the alternates don't know they're alternates.

MR. ROBISON: Understood.

THE COURT: And with this seating arrangement it's easy to do because you've got a seat for every one of them. If you have some guy sitting on a chair over there he might figure out that he's on a different level than the other – no pun intended, but he would be or she would be.

MR. ROBISON: Understood, Your Honor. I would still like to state the preference on behalf of Mr. Gray that we go with a 12 person verdict.

THE COURT: Well, we can stick with that if that's what you want and just – Mr. Westinghouse?

[17] MR. WESTINGHOUSE: I'm sorry, I thought we had come to a conclusion.

THE COURT: Well, I'd still prefer to go with the two alternates.

MR. WEFALD: I would, too. I think two is fine.

THE COURT: If we're getting down to the government's estimates, six to seven weeks, these things do tend to speed up after a while and – okay, let's say two alternates. Do you still want an extra challenge for the alternates?

MR. BENTLEY: Yes, Your Honor.

THE COURT: So we're at 18 and 11. Is that satisfactory to all that we treat the 14 as if we're selecting a jury of 14?

MR. WEFALD: Absolutely.

THE COURT: Hearing no objection –

MR. BENTLEY: Your Honor, I would object. I would prefer to take 12, see who they are, and then proceed to the selection of alternates. If the majority is in favor of doing it the other way –

MR. WESTINGHOUSE: Your Honor, may I offer perhaps an alternative that I believe was followed in the Order case and as I understand it was found to be somewhat agreeable to all parties, and that was there was not a distinction between alternates and regular jurors made during the course of the trial and at the conclusion of the case, before the case was [18] submitted to the jury, each side was given the opportunity to challenge a juror, and so the remaining 12 were those that were not challenged by the defense or the United States. In essence, each side reserves one challenge to the end of the case or has an additional challenge.

THE COURT: That's an excellent arrangement and I'll tell you why, there is nothing more frustrating than having two alert alternates sitting there and one sleepy juror to whom you've already committed yourselves and no chance to get that juror off. What about that? That sounds like a wonderful –

MR. BENTLEY: We agree to that, Your Honor.

MR. WEFALD: Great.

THE COURT: So in essence—was that an objection?

MR. KELLOGG: No, Your Honor, I'm agreeable to that, too. I want to go back to something else because I think that maybe I don't understand. If we have two alternates then we're agreeing that if the occasion comes up during the course of the trial we're agreeing to have a jury of 11 rather than 12—

THE COURT: No, there has been at least one objection made to that and if there is one objection made to that I'm not going to force it on counsel.

MR. KELLOGG: Okay. I just wanted to clarify that.

THE COURT: No. We're still sticking with a jury of 12, but you're going to select your 14 as if they're all your jurors and then we will give each side one challenge at the [19] conclusion of the case and that's how we'll select the 12.

Now, wait, let me anticipate a problem. Let's say we lose a person. Do you each get half a challenge? What do we do about that?

MR. WEFALD: If we lose one, the defense gets to challenge.

THE COURT: Somehow that does cut through a lot of the problems. Do I hear a total agreement on that?

MR. WESTINGHOUSE: No. I didn't hear actually the question, but I sense what it was now.

THE COURT: Just from hearing the answer, right? Okay. Counsel, I'm glad I thought of it now.

MR. BENTLEY: May I suggest that the last person in the numerical order be excused in that eventuality.

MR. WEFALD: Oh, no. He's already conceded to our point.

THE COURT: No, he hasn't.

MR. WEFALD: We're going to kick the last one off.

THE COURT: He didn't really.

MR. WEFALD: Didn't you?

MR. WESTINGHOUSE: (Shakes head.)

THE COURT: No. I asked facetiously did everyone agree and Mr. Westinghouse said no. What do we do if we lose one, counsel? Both sides want it this way and I think it's worth making some kind of arrangement and compromise to get it [20] this way because it sure sounds like a good arrangement, but the reason we're having two alternates is we're anticipating we're going to lose at least—obviously if you lose two people there's no problem.

MR. WESTINGHOUSE: I agree with Mr. Bentley, I think if we lose one his proposal is the only reasonable alternative to follow.

THE COURT: The other is to do it randomly, just put all—what would be 13 at that point names in a hat and draw one.

MR. WESTINGHOUSE: That would be fine as well, Your Honor.

THE COURT: One is as random as the other. I mean, taking your last personal.

MR. BENTLEY: That's fine.

MR. WESTINGHOUSE: That's fine.

MR. BENTLEY: I prefer that.

THE COURT: Prefer the random?

MR. BENTLEY: Yes, Your Honor.

MR. ROBISON: May I be heard?

MR. BENTLEY: One thing I'm thinking of, Your Honor, is that this system would perhaps tend to assure more attentiveness on the part of all the jurors because they would all know—

THE COURT: No, I wouldn't tell them that. I wouldn't [21] tell them anything about it. As far as they're concerned, they're all going in.

MR. ROBISON: Your Honor, it seems to me—

THE COURT: They know it's a 12 person jury so they may figure out that somebody is not going in. We could say at that point we haven't—I would rather not say any-

thing and I will listen to what counsel want. My suggestion is you just don't say anything.

MR. ROBISON: I would propose on behalf of Mr. Gray that it be the last person selected because strategically when you exercise your perempts you sometimes would leave that person on thinking that he is going to be the last one—

THE COURT: Not when it's simultaneous, counsel. You really have no way of knowing—you see, when it's simultaneous challenges you don't know who the last person is going to be. The last person really takes on no more significance because what you're doing is taking—let's say right now we had a panel of 30 to 40 to choose from. Say 30. You're going to pick your—

MR. ROBISON: 18.

THE COURT: —18. They're going to pick their 10 and then I can go through and pick the lowest.

MR. ROBISON: Are we passing a ballot?

MR. WESTINGHOUSE: No.

MR. ROBISON: No ballot, all right.

[22] THE COURT: See what I mean?

MR. ROBISON: Yes.

THE COURT: Okay. Can we go with the random then if we're down to one and you each get a challenge if there are two?

MR. WEFALD: Right, that's fine.

THE COURT: So we're back to—we're really back to 18 and 10 with one and one reserved.

MR. WESTINGHOUSE: Your Honor, I thought it was 18 and 11.

MR. RAWLS: That's right, Your Honor.

THE COURT: I'm sorry, 17 and 10 with one and one reserved.

MR. WESTINGHOUSE: That's right.

THE COURT: Okay. Dd you have other things you—

MR. WESTINGHOUSE: Your Honor, the only other matter that we discussed was the matter that the United States had raised by letter with the Court and counsel and that was the subject of the schedule for trial. I think the Court—

THE COURT: Did you get my letter back?

MR. WESTINGHOUSE: No, Your Honor.

THE COURT: It went out yesterday. That's all right, I can tell you right now.

MR. WESTINGHOUSE: All right. Perhaps that moots that issue.

[23] THE COURT: Yes. Well, there are a few other things. One of them is the schedule. I wrote you a very apologetic letter, Mr. Westinghouse, because I know counsel prefer that, but it would be really difficult for the Court to function on that schedule.

For out of state counsel, there have been trials—when there have been lengthy trials, some judges have opted for an 8:30 to 1:30 trial schedule, you know, sort of going straight through, no lunch hour, and using the time that way and Mr. Westinghouse and Mr. Wales had suggested to the Court that I adopt that schedule and I have rejected it and I'm going to stick with the traditional trial schedule.

Let me give you some of my reasons other than that it would be difficult for the Court and that is—it leads me into a few other things on my list that counsel should know about. It's this Court's preference and a very strong one that if there are problems that arise in the course of trial, evidentiary or otherwise, that needn't be dealt with at that very moment—I mean, obviously if it pertains to a document that a witness is about to read to the jury, of course I'll handle it at that time—I'd prefer to handle most

of the matters that counsel suggest we take up at sidebar at the end of a session, not on jury time.

In other words, if we take a 12:00 to 1:30 lunch break for the jury we can come back at one o'clock and we can pound [24] out anything we want. If the jury goes home at 4:30, we can stay 4:30 to 5:00, we can come in a 9:00 to 9:30. I want those extra times for us to fight out those issues so we don't keep the jury sitting around and waiting. In a long trial that can add up.

I also frankly want the freedom if the trial is going very slowing to use those extra half hours, bring the jury in a little early, cut our lunch hour short or stay a little later and add that time on to the trial. I hope we don't have to do that. But I want that option to do that.

Does that worry you, Mr. Wolfe?

MR. WOLFE: No. I think this is perhaps a good time—the defense counsel have a list as well. I think this might be an opportune time to at least address a couple of the matters that we discussed this morning. We had a meeting this morning with all counsel represented, except for Mr. Rawls and Mr. Frost and I was able to talk to Mr. Frost on the phone.

And I have—this is a difficult position to be in, making a request of this nature, but we believe that it would be appropriate and most helpful and would promote a speedy—speedier trial if this trial date were kicked over one week.

Mr. Westinghouse has indicated to us that he will supply the documents that Monday or perhaps the Friday before the trial starts and that it will be a multi-volume document production. We believe that it would be helpful for all [25] defense counsel to have reviewed that, gone through and to work with the government concerning any problems that we might have with the admissibility or the content of any such document.

I can represent to the Court that Mr. Gray and his counsel and a paralegal have reviewed 20 boxes of documents and have pulled documents from those materials; that last week we received another two boxes and it is not through any lack of diligence on the part of the U.S. Attorney or the FBI that the 16 production is still being made, but the fact that this is a very complex case, with numerous documents.

We also received, I was told this morning, somewhere between 12 and 18 inches of long distance toll records within the last week, which we need to review and identify the critical phone calls in the timeframe.

I just—I can represent to the Court that having reviewed the documents since we began receiving them in October and being very diligent in our efforts, that we simply feel that an extra one week is necessary, we feel that it will promote a more efficient trial. Now, with respect to Mr. Frost, I—in my discussions with him I understand that he was appointed three weeks ago, that he had not intended to be present at trial as local counsel prior to that time. He has not reviewed any of the documents. He feels that he is unequipped right now to go to trial. He has been in trial in state court the last two and a half weeks. And that the [26] additional time would assist him in preparing and I can represent to the Court that myself and Nancy Ritter, a paralegal that works for me, we are willing to sit down and spend some time with Mr. Frost in trying to bring him up to speed.

But we are really—we have our backs against the wall and we do not have an extra—we need extra time.

MR. RAWLS: May I address the same item, as I was not a part of all this? Judge, there are numerous boxes of documents that were removed from our office and given to Mr. Kanev as attorney for Mr. Olano. We need those boxes back in New Orleans so that we can sit down and go

back over them. These telephone records and things that they're talking about, obviously I haven't seen them and obviously they are not available to us in New Orleans.

THE COURT: About that, I can tell you right now, Mr. Kanev is going to tell me he needs them here because Mr. Olano is being moved up here and their intent was to use what little time they feel is left between now and trial to review those documents. You're going to have to work that out. There obviously is one set of documents. The Court is certainly not going to order anybody to copy these documents or pay for the copying of those documents. Somebody is going to have to come somewhere and since Mr. Olano is in custody and he's here, I suggest that you give some serious consideration to moving to [27] Seattle for a while, Mr. Rawls, because those documents are here, the marshal's office has arranged for a place for them to be reviewed at some time and trouble at Mr. Kanev's request. Now we're not going to go through moving them back to New Orleans, I can tell you that. So you—leaving that aside, were you asking for more time also, is that what I'm detecting?

MR. RAWLS: Your Honor, Mr. Kalterman's attorney of choice is Ralph Whalen. I am in Mr. Whalen's firm, I am prepared to go to trial, I do have a motion enrolling me as counsel, I have practiced in federal courts in two different districts on a regular basis.

Mr. Whalen will be totally unavailable until after his wife completes a difficult pregnancy. It is scheduled to go five more weeks. However, it's not going to go to term; as I said it will be a difficult pregnancy. If we are given a continuance of a month I'm sure that Mr. Whalen could be here and we would also have plenty of time to examine all of the documents in our office, which is certainly better than reviewing them in some hotel room or at the courtesy of some obliging attorney up here in Seattle.

THE COURT: You mean a month from now or a month from the 23rd?

MR. RAWLS: A month from now.

THE COURT: Can't do it. The Court has other trials scheduled and besides I remember when we went through this and [28] scheduled it counsel had problems with that time, didn't he?

MR. RAWLS: Your Honor, I didn't expect to prevail in my request, but I making my request and I appreciate your hearing it.

THE COURT: We knew about that problem and it was a tough call for the Court to make at that time because I appreciated Mr. Whalen's problem a great deal and I would have liked to have obliged, but given the problems of everyone else concerned we did what we had to do in terms of time. What's your feeling about the week?

MR. RAWLS: Any extra time we get is appreciated, Judge, simply because of the document problem, particularly if these documents keep surfacing up here in Seattle. But I would with respect emphasize this, that neither Mr. Whalen nor I is going to request a continuance on the Court trial for our own personal pleasure or convenience. We do put our client's representation first and we will be here ready to go for trial whenever and wherever the Court says we go.

THE COURT: Thank you, Mr. Rawls. I appreciate that.

MR. WOLFE: The one matter when I looked at my notes that I neglected to add was a request by Mr. Kanev as well. His client, as the Court knows, is not yet in the district and he has spent I believe the New Year's holiday with Mr. Olano but has not yet been able to meet with him on a regular basis and he has indicated that the extra week would greatly assist [29] the preparation of that defense.

THE COURT: Let me tell you the problem, counsel. I haven't heard from the government and how it feels about this. Any strong feelings one way or the other, Mr. Westinghouse?

MR. WESTINGHOUSE: Your Honor, I think it's fair to represent we do not. We can be prepared to proceed and plan to be prepared to proceed on the 23rd. However, as I'm sure is obvious in a case of this magnitude an additional week would certainly be well received by all parties. So I think it's a situation in which we will be here and prepared for trial on the 23rd, but if the Court's pleasure is an additional week—I can understand defense counsel's request.

THE COURT: It's not the Court's pleasure at all, but let me tell you what the situation is, counsel. Right now I have given you the low end of your estimate before I have another trial that has speedy trial problems scheduled for April. There is also the fact that this Court is probably going to be out of town beginning about the 30th of Mrach, for a few days in that period into the first of April.

If you continue it for a week and if the trial goes as long as you think it's going to go and now you have to start getting into really figuring what your trial is going to be, one is you're going to cause the Court problems with the following case and the other is you may end up with a break in your trial, which I was hoping somehow we would avoid by maybe [30] seeing this case accelerate a bit.

Now, I wanted you to know that and see if you still are asking—

MR. WOLFE: Judge, I don't believe that there would be any way that we could avoid a break in the trial given the government's estimate of a six to seven week case in chief. We have not yet been able to determine what the length of Mr. Gray's case will be, we are now in the proc-

ess of—we've developed a theory and we are now in the process of locating the witnesses.

I do think, though, and I can represent to the Court, that the week would give us time both among defense counsel working together to identify problems that might arise during trial based upon the anticipated exhibits that the government would offer and to work with the government and to—to expedite this trial in any manner possible. I certainly don't want to be sitting here for three months.

THE COURT: Oh, counsel, rest assured—

MR. WOLFE: Or even two and a half months, but it may be possible. if I were not in the position of having gone through all of the documents and having reviewed it, I would be more reluctant to make this request, but I think I can represent to the Court that we have been doing every—working daily, full time on this case for several months and that extra time will be critical if we are to go into trial and have a [31] cohesive opening statement that we could present to the jury and identify the witnesses and focus in on circumstantial evidence that will be helpful to Mr. Gray. I just don't think a week is going to be detrimental to—

THE COURT: Well, the only people the week will be detrimental to will be the defendants in the following criminal trial, which as I understand it—well, let me—what I'm going to have to do, frankly, Mr. Wolfe, is take a look at that trial and see what the speedy trial problems are because there are motions pending and there may indeed be exempted time that makes my concerns not as germane as I think they are. If you—if none of you are distressed, dismayed or shocked at the thought of a week or seven or eight day break in the trial, which somehow seems to please everybody rather than—I thought I was going to carry the day on that one for starting the trial right away,

but everyone seems pleased about that – then that concern is removed.

MR. WOLFE: That might be helpful to us.

THE COURT: It might be helpful to you. My concern was your feeling about the jury. Actually my experience has been that the jury is often pleased to get a break at that point also. Let me give it some you thought and get back to you on that.

I just want to say this, counsel: You know, I can see a week and I detect that the government would be almost pleased [32] to go along for a week and I really do believe that the ability to go over exhibits together and curing objections may end up saving almost that much time in trial time.

I just want you to be wary of the fact that almost any case can always use more time to prepare and that if you get the week, this is it, because you really sooner or later have to cut bait and try this case.

MR. WOLFE: We're not suggesting that we would be back asking for more time.

THE COURT: Okay.

MR. WESTINGHOUSE: Excuse me, Your Honor. Might I inquire as to the week – the dates of the Court's anticipated break?

THE COURT: Let me give it to you exactly. March 30th through April – probably be back in trial April 2nd.

MR. RAWLS: 2nd?

THE COURT: It's a Thursday. You might ask me for that – you might ask me not to come back for Thursday and Friday.

MR. RAWLS: April 2nd, you say? You're only talking three days, four days.

THE COURT: I'm sorry, I don't mean April 2nd, I mean April 9th, April 9th.

MR. WESTINGHOUSE: So March 30th through April 9th?

THE COURT: (Nods head.)

[33] MR. WESTINGHOUSE: And if I understand correctly, that's a certain break in the trial?

THE COURT: Yes. Right now I had anticipated that break would kind of come at the end of the government's case and it seemed to me pretty easy timing. Now, it probably with a week's different won't, but counsel don't seem to be terribly distressed at that thought.

Okay. Let me raise some other things while I consider that one, and as I say I'll let you know about that.

MR. BENTLEY: Your Honor, before the Court moves off that topic, let me just, if I may, throw in another fact for Mr. Marler. Mrs. Marler is now eight and a half months pregnant and is expecting her child on February 20th. Mr. – the family has five other children from age 13 on day and Mr. Marler asked me to petition the Court for an extra week on that ground as well.

THE COURT: Sure, but –

MR. BENTLEY: He is ready to come at any time after the birth, but he would like very much to have the opportunity to be present.

THE COURT: Is there something special about the 20th? I mean, how does he know?

MR. BENTLEY: That's what the doctor said. Of course there is a range.

THE COURT: He may know more than other doctors.

[34] MR. BENTLEY: I understand, but I just wanted to give the Court another factor here. We join in this. We would welcome an additional week. We have no problem with the break.

THE COURT: I'm afraid to let that be the basis of the Court's consideration because if she's a week late then

we'll never get to trial on the following week. But anyway, I'll certainly be aware of that. But let me go on and approach some of the other factors that I have on my list that I think I'd like to get out of the way today as long as I have you all here.

Anybody else expecting anything—expecting a baby in the course of this trial?

MR. FROST: I'm not, Your Honor, but I just wanted to concur with the remarks that Mr. Wolfe made about the additional week on behalf of Mr. Ascani. Mr. Ascani's alleged involvement is somewhat different than other defendants so it's not nearly as complex to prepare, but the additional week would really be helpful to us in terms of being able to be up to speed.

THE COURT: Okay.

MR. FROST: Thank you.

THE COURT: The taking of notes, counsel, I think is probably going to be essential in this case and the jurors are going to request it and the reason I'm bringing it up now is it's always a pain to figure after somebody has put on some [35] witnesses and then the jurors ask to take notes—I think we should discuss it now and it's my opinion the jury should be allowed to take notes and they should be allowed to take notes from the beginning so they get the benefit of the opening statements and early witnesses and the whole thing.

I just wanted to clear that with counsel so we don't have it come up in the middle of the case and then somebody says, well, they didn't take notes during my witness, so I don't want them to take notes now. I think if we have them start out—I think we're going to have to explain to them right off that it's going to be a complex case and there's a notebook and if they want to use it, fine. And I'll give whatever the cautionary instructions you want me to

give—you know, the notes don't take precedence over the live testimony, et cetera, et cetera.

There is a suggestion, and I don't know how—it's new to me, but some—it has been used in some long extended cases and attorney seem to like it. As a Judge it makes no difference to me one way or the other, though I'd probably find it helpful and that is the idea of having a little snapshot of the witness attached to maybe the witness' name going back to the jury at the jury at the end of the case so the witness can be recalled in an easier way to the jury. It's just an idea I throw out to you because in lengthy cases sometimes the witnesses—the jurors have a hard time remembering, you know, who was that guy [36] that said this. You know, they have their notes and then they can staple this little—we're not talking about glamour shots, we're talking about like a little passport photo.

I throw that out to you for whatever it's worth. If anybody wants—I don't want it to become a stumbling block or a major issue. I think it's something that's designed to help the jury and not to cause counsel more headaches, but it is a possibility. It can also be helpful in their remembering which defendant is which defendant. So it cuts both ways if we assume—the government may have the bulk of the witnesses. On the other hand it may help the defendants, too.

I would be willing to go along with it if counsel think it's a good idea. I don't expect an answer today. But if you decide to do it, it just would be something to prepare for. If counsel are going to need—

MR. WALES: Your Honor, if I might just ask the mechanics by which—or which the Court imagines would be used. Who takes the picture?

THE COURT: You bring in your own pictures. If you want to do it, your supply the pictures of the people who

are going to be your witnesses and your defendants and then we will make a master list and staple a picture next to every name, and if we don't have a picture for one person, I suppose we could just decide to go in without it or whatever. I mean, your just write down Joe Smith and a picture of him and just go [37] down the witness list. And if you want the defendants, whether they testify or not, to be on that list—they could be. Some people think it helps the jury recall the demeanor of the witness on the stand if they can see a picture maybe six weeks after they've heard the witness testify.

MR. ROBISON: Can we leave that to be resolved between us?

THE COURT: Absolutely. I don't expect an answer today. It's just something, if you're going to do it—I just wanted to give you some food for thought to think about. If you want to do it, fine. If you don't want to do it, it's nothing. It's just one of those things that people who try long cases all the time I guess have come up with as a way of assuring themselves that the jury really remembers the guy who was on the first day.

MR. WESTINGHOUSE: Your Honor, I think that's something that we could certainly accomplish through the use of a Polaroid and I think we would be agreeable to it. Along that same line, if I may, in my prior experience with more lengthy cases I have found it to be helpful or at least I perceived that it may be helpful to send a copy of the exhibit list to the jury. We have our exhibit list or anticipate we will have it all on word processor so that we have the capability of deleting those entries which have not been admitted and adding those which are presented and marked at trial for the first [38] time, and I would ask that we consider the possibility of having the exhibit list available to the jurors for their deliberations. I think otherwise they just cannot find the records.

THE COURT: That is the Court's practice. And if you don't send it back they ask for it anyway. They'll only ask for it the first day because they have no way—they know we have one because they see you using it and they see the magical way in which you refer back to an exhibit and come up with it and they're going to ask for it. I've never heard any one find a reason not to give it to them. so it may be just as well with some notice for you all to start preparing one for the defendants, which brings me to the next question.

Are the defendants going to find a joint way to mark exhibits so that we don't have Mr. Ascani's exhibits and Mr. Olano's exhibits and Mr. Kalterman's exhibits with A1 and B1 C1. Is there any way we can work on that?

MR. WOLFE: That is a topic yet to be discussed. And I think it would take some time—again it will take some time for us to be able to bring together the exhibits and make that decision.

THE COURT: If you had an extra week—

MR. WOLFE: Sun of a gun. I don't mean to hold the Court hostage for an extra week but—

THE COURT: I haven't done settlement conferences for [39] nothing. I know a negotiable item when I see one. I strongly urge you to do it for the jury's benefit. It may be extra work for you now, but I bet it will be to your beefit when you go to look for those exhibits in the long run, because chances are you are going to be using a lot of the same records and it will be easier for you to find a record that another defense counsel has referred to if you don't try to duplicate it in some way or set up your own list.

And in addition to that, I would suggest that you seriously consider coming up with a joint voir dire set of questions rather than each of you giving me the same questions over and over again.

And I'm also going to ask that to the extent that there are any motions in limine or concerns like that you try to make them joint concerns, joint motions. One of the things that I would suggest is that you divvy this up and make one of you lead counsel for purposes of voir dire, another one do the motions in limine and you can feed your ideas into that, counsel, but let them do the wording and the preparation and typing.

MR. WOLFE: We've already taken care of that.

THE COURT: And voir dire, too, voir dire questions?

MR. WOLFE: Yes.

THE COURT: Good.

MR. WOLFE: Then the exhibit list should just follow I [40] hope along that – you've taken care of the exchange of witnesses, voir dire. All right.

Now we come down to what I consider probably one of the more important –

MR. WOLFE: Excuse me, Your Honor. With respect to the proposed instructions that are customarily submitted before trial we would ask that that rule be waived in this case. We would try to submit them – this case is going to be somewhat complex vis-a-vis the conspiracy count and it would be helpful for us to have heard a bulk of the government's evidence with respect to the conspiracy before we are required to submit the instructions concerning that count in particular.

We can, of course, submit boilerplate instructions at the outset, but I think it would be better if we submit instructions tailored to this case and we could do that presumably by the end of the government's case.

THE COURT: Well, it might be good for you to be doing that during that week.

MR. WOLFE: We're working on them right now, but I'm just saying –

THE COURT: Well, let me make a suggestion to you in terms of the instructions. One, of course, I think they should be joint instructions to the extent – unless somebody really has a pet instruction that you feel –

MR. WOLFE: I think Doctor McCuin is in the other [41] case. There won't be an insanity instruction submitted in this case.

THE COURT: Right, that's what I meant, unless there's a special instruction that the rest of you can't go along with.

I think for all intents and purposes you may as well use the Ninth Circuit pattern instructions wherever possible and what I'm going to ask is that you end up submitting to me two sets of instructions. Well, okay. There is the instructions that you have to put on file to preserve your record, okay. All of you want to put in a complete defendants' set of instructions and a complete plaintiff's set of instructions, and then what I'm going to ask that you do is go through your instructions, plaintiff and defendant, and decide which you can agree on and you know there are plenty of them which you can agree on. You should be able to agree on an elements instruction, you should be able to agree on a burden of proof instruction and on an expert witness instruction, you know, all the presumptions, and then give me a very thin pack of the ones you can't agree on, okay. I mean, the ones on which you really have an issue of law that you want to do citations on.

I'm not saying you shouldn't again submit what you want for the record so you have them on file, but I think if you sit down you'll find that you can agree on probably, what, nine-tenths of the instructions and maybe there will be a few, [42] I hope only a few that you can't, and that would make life easier, and that I will say, knowing that that takes a lot of time, we will set a new date on when you

can do the instructions. You can't do that by the first day of trial, I know that.

MR. WOLFE: Judge, Mr. Westinghouse and I were just conferring, are you saying you want the instructions before trial?

THE COURT: No. I'm saying that in exchange for that extra work that I'm asking you to do by sitting down and agreeing on the instructions I would agree to have the instructions – why don't you have them ready for me when I come back?

MR. WOLFE: That's perfectly fine.

THE COURT: But let me just say this. If we notice that the case is accelerating rapidly, somebody better bring to my attention the fact that we haven't done the work on – that you haven't done – because it's always easiest for me on short notice to sit down and work on them, but if I haven't got them and you have to first prepare them, you're the ones that are going to end up with that burden. Do you understand? I mean, cases do sometimes speed along. I'm trusting you're not going to be done before March 30th when I say get them to me by the time I get back. But we'll see. Okay. Meanwhile, that's the new date. [43] Okay. That brings us to – once you've exchanged all your document lists, do you think there is going to be a need for storage of documents here? In other words, in lengthy cases we often arrange to have the parties bring file cabinets in and keep them out in that vestibule out there, so you don't have to cart – you know, by the end of the trial your arms won't have lengthened an inch or two; take back what you need to work on but you can leave stuff here. And we lock the courtroom and it will be okay.

If you want that, you have to make the arrangements. Get a file cabinet over and you can leave it out there and you can each have a file cabinet. I don't want to say as

you want, because thee are too many of you to give you as many as you want. But let's say the defendants can have two, work it out, work it out with Ms. Tyree, and she will make the arrangements of when you bring it in. Okay. Just have it ready to go with whatever you need.

Okay. Now, we come to the two topics that I consider probably the most important and often the most difficult to work out, though maybe defendants have already thought of this, and that is how are you going to handle objections and cross-examination so that we don't have repetition with resulting boredom to the jury, becaue if there is anything that turns a jury off it's seeing another attorney stand up to [44] ask the same questions of a witness. I know you're not going to do that deliberately because none of you would, but have you thought of any systematic way to handle that?

MR. WOLFE: We are in the process of developing a plan for that. It was discussed at this morning's meeting. Counsel have been discussing this problem for a month. We are aware of it and sensitive to the issue.

THE COURT: Okay. What I would think would be – if you are getting witness lists in advance, which you all are, maybe you could assign – and you're getting the documents, you know which documents will go with that witness, maybe one way would be to assign a counsel, usually the defendant's counsel to whom that witness is most pertinent, to cover that witness and then feed in questions and points you want that counsel to cover.

MR. WOLFE: That's basically the plan that we're working on.

THE COURT: Okay. then the –

MR. WEFALD: Your Honor, the objections, in a conspiracy case I went through about a year ago we just – an objection for one defense lawyer was an objection as to

all, so that we didn't have to make a record to preserve it. So if we could just have a standing agreement that if one objects it's an objection as to all on the record.

THE COURT: It's on the record as of now that [45] that will be the case, so you don't all have to stand up. Now, it's not as simple as that, though, because often one counsel will think of an objection that he thinks is the right one and the objecting counsel, lead counsel, who's making the objection may not have thought of it. If you're sitting close you can just go ad heresay, you know, something like that, rather than have everyone popping up to do that.

But why don't you consider that because I'm willing to have one objection stand for all, but you may not be willing to do that if the objecting counsel doesn't make what you think is the key objection and you should, of course, still have the right to add to it if he hasn't done so.

Okay. Now—well, that sounds like you've already given that a gret deal of thought. And I'll throw the lst issue at you because this is going to take, I think, the most time, unless you've already thought of this one. Oh, wait a minute. There are a couple of other ones and that was—there were some questions raised about seating arrangements and the use of the word defendants, that kind of—let me say this about the use of the word defendants. Even if I made the ruling it would be meaningless. I would predict that within the first five minutes of somebody's opening statement, if the government could even possibly avoid it, codefendant would. It's just too much in the vernacular. We cannot really think we can get through a trial without calling the people on that [46] side of the courtroom defendants and this side of the courtroom plaintiffs. I don't know any other natural way that lawyers have of referring to parties in a case. They do so when the jury hasn't even grasped what plaintiff and defendants mean. So I'm going to have to—I just don't think that's a viable suggestion.

MR. WEFALD: Let me just address that point a moment, if I can. I understand the difficulty with it, but what I request is, and I hope counsel for the United States, the plaintiff, will in fact—

THE COURT: See, there you go.

MR. WEFALD: —address as much as we can a specific individual, and I think there is a real danger when we have a conspiracy trial, we're all together, the obvious thrust of it is if we put enough stuff in the air some of it is going to stick, and I think to the extent—maximum extent possible we have to treat the defendants as individuals. I'm confident that notwithstanding the fact that their brief reflects they're the plaintiff, that we are going to hear the United States versus the defendant and the government versus the defendants. The point of it is I thik we want to minimize to the maximum extent possible the kind of lack of indentity, the prejudice that will flow from that, and I just would ask the cooperation of counsel for the plaintiff, the United States, to do that.

THE COURT: Well, let me say this, I would to some [47] extent your concern may of necessity be minimized. I think if the government is going to make this case clear to a jury, and there are problems in so doing because it is a complicated case, they are going to have to use names. They are going to have to be a little more specific than in a general conspiracy case. So I think your problem is going to cure itself. They just can't keep saying this defendant or that defendant or the defendants, because you've got so many transactions, they're going to have to track it through.

As far as seating goes, let's see—we're going to need another table I suppose and my feeling would be we'll just—we've worked it out before with this many counsel. I'm not going to separate it out by defendants. I'm going

to separate it out by the need of this courtroom to get this many people in here and I'll work that out, so I'm not going to say two defendants sit here and five sit there.

Well get enough table in here. You're going to have to sit—you guys can pick wherever you want to sit, but we're going to have to sit more than one or two at a table. Its not going to work otherwise. We're not going to have enough room.

MR. WEFALD: As I counted there are 14 people that are going to be involved at a minimum on the defense side. I'm assuming, Your Honor, that when we talk about additional space we're talking so that my client is going to be sitting next to me so that we will be ble to have the assistance to assist the [48] counsel in the trial of this cae, and I'm contemplating that we're not going to have defendants over here and the lawyers up here.

THE COURT: No, we're not going to have that, but what you may have, for instance—Mr. Bentley is probably the best example of it. You may have Mr. Bentley sitting where he is sitting and his client sitting actually probably bout where that chair behind him is. In other words, there may be counsel at the table where they need to write and defendants may be one row behind them where they can still be turned and talked to, but they may not be sitting at the table. I'm not going to have your defendant sit far enough away from you so that you can't talk to him. We'll do the best we can and we'll work it out.

MR. WOLFE: Judge, we'll sit in the back corner.

THE COURT: Sure you don't want to sit out there. Okay. Now, we're going to turn to that issue I keep talking about and that is jury selection. We have sent out questionnaires to jurors, oh, I'd say roughtly 250 jurors, and asked them—we do this all the time routinely. You know, we've got a long case coming up, how many of you will be

available for this amount of time at this time. Of course it all says starting the 23rd, which may present a problem, but—that's part of what I'm factoring in in whether or not to give you the week's extension, but if you tell me we're still [49] talking roughly the same time period because we're gong to save so much time in that week it could work.

I have received 120—well, let's say roughly 130 or 140 requests for excuses. Now, we do not like to call in jurors and pay them for the day if they're the kind of excuses that all of you are going to agree when they get here they can be excused for anyway.

Now, you can do it one of two ways and I won't tell you which I have a preference for, but you can sit down and go through these excuses and see if you agree that they are the right kind of excuses so that we should excuse them or which should be called in despite the excuses or I could do it and I'm not even going to tell you which my preference is because frankly I don't mind doing it. It doesn't take all that long.

The distinct advantage of me doing it is there is one of me and it may be harder for you to all agree. On the other hand, this is a criminal case an you may want to do it yourselves. In civil cases lots of times the attorneys leave it to me. I don't care which way you do it, counsel. But I've got them here and we need to respond to these people because some of them keep calling everyday and saying am I really going to have to come there for an eight-week trial when I've told you that I can't for such and such, and we keep saying we'll let you know.

I'm perfectly willing to have some you, all of you, [50] select a few or do it all together and sit down in the jury room right now and start going through these, but we do need a decision made. Let me tell you, we have available now 90 jurors that have responded—you know, haven't objected to coming jurors that have responded—you

know, haven't objected to coming in. And if you add up your challenges we're okay. We're well within—even assuming that some people come in and emergencies develop or they suddenly look at one of you and turn out to know you or we read the witness list and they know the witnesses, even assuming—we could lose many and still have enough.

So maybe the easiest way is to just let me do it. On the other hand I don't want any of you feeling that there is something unfair about the larger panel. So whichever way you want to do it. They're here. Here they are. I've got them right here and I brought them out because I anticipated that at least one of you is going to want to go through it yourself; am I right?

MR. RAWLS: Your Honor, if you're just talking about separating the obviously meritorious ones from the questionable ones, I have no objection to the Court doing it itself.

THE COURT: I don't want to do that because I don't know what you consider obviously meritorious.

MR. RAWLS: No, no, no. What I mean Your Honor is that's what we're talking about, you are going to sift through the excuses and decide which ones are still up for grabs and [51] which ones should be final and told not to appear, isn't that what we're saying? In other words, there are some excuses that we all know in advance are going to be granted anyway and I have no objection to the Court doing it. I have no desire to look at those excuses.

THE COURT: Anybody?

MR. WESTINGHOUSE: The United States is prepared to let the task go to the Court.

MR. BENTLEY: I would like to look at them, Your Honor. I might after looking at a few decide that it was something I wouldn't want to spend more time on, but I'm a little uncomfortable with saying that I don't have an interest in something that I haven't even sampled.

THE COURT: Let me do this—

MR. ROBISON: I was just going to join in Mr. Bentley's position. We would like to see them.

THE COURT: Let me do this. Why don't you take the, those of you who want to see them and I would like you—does the government—let me say this, if the defendants see them, does the government want to see them?

MR. WESTINGHOUSE: Yes, Your Honor.

THE COURT: That's often what happens and then if some defendants see them, other defendants want to see them. I want you to do this. I want you to take them, I want you to look at them, and when you've reached the point where everyone is [52] satisfied, then it's—each one of you is willing to put on the record that you feel you've had enough of a chance to review it and as you reach your various levels of boredom looking through these excuses, just come out and say to Ms. Tyree defendant Kalterman is satisfied, defendant Ascani is satisfied, et cetera, et cetera, or stay through, it wouldn't take you all that long and make yourself a couple of piles. People you agree should be excused, people you feel the Court should bring in anyway. Again bear in mind as you read these that we do have 90 people ready, willing and able to serve. So I think that when in doubt about whether you need to haul a person in, remember we don't need, unless you're worried about cross-section, you see, and that is a legitimate concern—that is why I want you to look at them.

MR. BENTLEY: Your Honor, having just completed jury service myself in King county I will look at these with a view to how to write a successful letter for excuses. I was unable to do so myself.

THE COURT: Did you get to sit, Mr. Bentley?

MR. BENTLEY: I was only in the box once and I was stricken by the prosecution, but surprisingly in two weeks I never got closer than that to sitting.

THE COURT: Yes, that's why I question whether we need more than 90 people. What if you did find ten more that you wanted to haul in and we got a hundred people in here. You [53] know, chances are I'm only going to call—you know how I do it, I call numbers, and I probably won't even call half of them. Anyway, think about it. I do want you—since some of you are at least interested I want you to take a look at them.

That, I believe, concudes all the things I could think of for this conference. Did I spark any other ideas?

MR. WESTINGHOUSE: Your Honor, there are two brief matters. One a follow up. Can the Court indicate when we might know about the trial date? It is somewhat of a concern in terms of trying to juggle witnesses. We have at least one early witness who has advised us that he is afraid of flying and will be taking the train. He may have left already. I don't think so, Your Honor, but we do need to know.

THE COURT: If he left already he is probably taking the stage coach.

MR. WESTINGHOUSE: He is coming from that part of the country, Your Honor. He may need a stage coach.

THE COURT: Let me say this, I could probably let you know later today. I'm not thinking that I'm going to give it all that much thought. My concern, quite frankly, is the following case. It was the break in the trial which you've now set my mind at ease about and, frankly, it was the jury, whether this would make a difference starting a week late. I don't want to send out these questionnaires again. This I think is the second time we've sent them out for this case and [54] I don't want to send them out a third time. But if the jury clerk tells me that—well, if I see that we're well within the time that we told them—do you know what I mean, if we told them eight weeks and you're telling

me now we have a six-week case—but you're not telling me that, are you?

MR. WESTINGHOUSE: Well, I hate to have it be quite as certain as the Court just stated. We really do not know, Your Honor, is our problem. It's very difficult to estimate the length of cross-examination for various witnesses. We can certainly anticipate some will incur substantial cross-examination, but it's very hard to predict.

THE COURT: Let me get another reading on this, which I haven't asked, do defendants have any idea how long their collective case is going to be?

MR. WOLFE: As I indicated earlier, it's difficult to give an assessment of that right now.

THE COURT: Not even whether it's like a month or two weeks.

MR. WOLFE: I would not believe that it would be a month, perhaps two weeks. This was an earlier—

MR. ROBISON: We'll know when we see their witness list and the documents because hopefully a lot of the defense would be presented in cross-examination.

THE COURT: Okay. I'll get you an answer at the latest tomorrow.

[55] MR. WESTINGHOUSE: Your Honor, there are two other matters, one again relating to the trial schedule—

THE COURT: Still two other matters.

MR. WESTINGHOUSE: Well, I keep sitting down and more come to when I sit. Does the court contemplate rial on Fridays?

THE COURT: Yes, that was on my list actually. Let me say this, yes, in general, but bear in mind that—in this district Fridays are the days we save for sentencing and TROs and the various million and one other things that come up. My hope is that we will go on Fridays unless I

statement that they have been charged, unless somebody has an objection and then I'd have to know it and deal with it, as to why—it seems to met that that's the easiest way to deal with it, to state it in the opening statement.

MR. WESTINGHOUSE: I don't have any problem in doing that. I would hope that the Court would maintain an open mind with respect to whether the indictment should be forwarded to [57] the jury. We think because of the complexity of the case there are some unique reasons in this instance why the jury should have the benefit of the indictment, because I think without the indictment it's very difficult to keep in mind the individual transctions and how they fit into the indictment itself. And I think in fact in terms of the proof as to the allegations in count 1 and the allegations that are not set forth but are closely related that come in through evidence, the jury needs to know what is in the indictment particularly.

THE COURT: Well, it all depends. It depends on whether the government submits a—one of those instructions that summarizes the whole case and summarizes the indictment. I mean, sometimes—you can't have it both ways, do you know what I mean?Sometimes there's this—it usually comes about instruction number three or four, it's before the elements instructions and after the function of the jury instruction and it sets out what the whole case is about and basically summarizes the indictment. If that's going to go in, then often it's easier not to put in the indictment, but if the indictment—I'd certainly send it back if the government felt strongly that—I don't know whether to send back the whole indictment; I don't know that they need to see everything about Zaki Mansour.

MR. WESTINGHOUSE: I'm not so concerned about that if we have an understanding that we can advise the

cannot—there is something I really have to schedule because I could start trial at 10:00, for instance, and I can get my sentencings done by doing them earlier. So my hope is in general to go on Fridays. The best I can do is give you as much warning as I can. I can't—I really usually don't know often until the week. If I know in advance that I've got something going on that Friday, I will let you know.

MR. WESTINGHOUSE: I think we understand and that's fine for planning purposes. The last matter that Mr. Wales and I wish to raise is the matter with respect to the indictment. As the Court knows the superceding indictment contains approximately 7 counts, the first nine of which relate to the defendants before the Court now, the latter part of the indictment relates to the two defendants who have been severed.

[56] We, of course, believe it important that the jury understand that Mr. Mansour and Doctor McCuin have been criminally charged because we anticipate that a defense that we may hear is that the problem was all created by those two gentlemen and the government hasn't done a thing about it. We don't think that's appropriate.

I'm looking for some guidance as to whether the entire indictment will be presented to the jury, whether only the first nine counts will be presented to the jury, and if that is the case some assurance that the Court will advise the jury that the other defendants have in fact been charged.

THE COURT: Well, this may help a little. I don't usually send the indictment to the jury. I often count on the jury instructions to set forth the government's cae adequately and I do not find that the indictment clarifies matters. And I would suggest that what we—the way we handle this is to find a statement that would not—some innocuous way way of stating in the government's opening

jury in opening [58] statement or in closing argument that they have been charged. I'm not concerned about that and we are certainly prepared to limit it to the courts relating to these defendants. But I think in terms of trying to summarize particularly the conspiracy that may be a very, very time consuming and difficult task, which obviously needs to be addressed in terms of our opening and closing, but I'm not certain that I am comfortable in doing that to the exclusion of the indictment.

THE COURT: Okay. But we will have some reference in your opening statement to the existence of the other two counts or whatever.

MR. WESTINGHOUSE: Fine, Your Honor.

MR. RAWLS: If I may respond at this time, Your Honor, I would object to the indictment going to the jury. It's the road map of the government's case. Your Honor has already indicated that you're going to let the jurors take notes. If in a couple of months the government can't let these people figure out what the government thinks was going on, and I think that's the government's problem, they don't have a case, I would object to the indictment going to the jury, particularly an indictment that contains so much extraneous matter.

I have a particular problem since my client is even in the government's own telling of the story a minor party and with all of this going in to the jury of what the grand jury wants to say about all these other people, I don't think – I [59] think it's going to be close to prejudicial to my client.

THE COURT: It's obviously premature now for me to make any kind of a ruling. I don't know how much extraneous material there is because I don't know what's extraneous and what isn't because I haven't heard the proof. So I understand the concern and some time in seven or eight weeks we'll probably face this issue again.

MR. RAWLS: I'm sure we might hear from it again. Also speaking as to the Friday possibilities, if I were here and my client was here, we would love the opportunity to spend one day a week going back to our regular affairs, but my client and I are both traveling from Louisiana and the longer this trial goes on the greater inconvenience it will be to him and to me. so the Court's position that Friday will generally be a trial date other than when the Court has other things that have to be done is certainly an acceptable one to us.

THE COURT: I would predict that except for really unavoidable matters we'll probably go on Fridays, even if we start at 10:00, and what I would do then probably, counsel, would be just to cut the lunch hour and make it from 12:00 to 1:00 and make up a half hour that way or go a little later or something like that.

You still have two matters, Mr. Westinghouse?

MR. WESTINGHOUSE: No, I'm at the end of my list, Your Honor. Thank you.

[60] THE COURT: Does anyone have anything else?

MR. ROBISON: Could I confer with the prosecutor before we adjourn?

THE COURT: Sure.

MR. WEFALD: Can I mention something while he is conferring?

THE COURT: Sure.

MR. WEFLAD: I appreciate the Court's concern about Friday. Insofar as we might be taking Fridays off, just some advance notice would be helpful for those of us from out of state. The only Friday that strikes me right off the bat that would be useful for my purposes to take off would be Friday, April 17th, which is Good Friday, the Easter weekend. It's typically a nice –

THE COURT: Counsel, we're not still going to be in trial by April 17th, are we?

MR. WEFALD: You're coming back April 9th, I understood.

THE COURT: Oh, yes.

MR. WEFALD: In any case, if we're there, I would appreciate the Court's consideration on that. That's typically a weekend that has some signficance to many families and it would be nice to be home.

THE COURT: That's true; you need some time to get there, too.

[61] MR. WEFALD: I can get home leaving here at 5:00 on the day—I will be home that same night. So the Thursday I can get back home and be back all day on Friday.

MR. RAWLS: Begging the Court's indulgence, am I to understand that I can't get those records back to New Orleans between now and trial?

THE COURT: I think it's highly unlikely. I mean—I've had no request, written request

MR. RAWLS: They were taken from our office a couple of weeks ago and I wan't in on what was said and what wasn't said, but I think we were under the impression that they were only going to go to a hotel room and they wound up back in Seattle, and I don't want to represent to the Court that that's what was agreed because as I say I was not a part of it.

THE COURT: I think you'd better discuss this with Mr. Kanev. I have nothing before me on any of this other than his need for the documents and his concern about getting them here and he finally managed to work that out. This is the first time it has ever come to my attention that anyone else—

MR. RAWLS: The first opportunity, Judge.

THE COURT: Right.

MR. RAWLS: Of course if we start a week later that will help solve that problem.

THE COURT: In that you could review them here, you mean, get here a little earlier?

[62] MR. RAWLS: I didn't really want to go to Mardi Gras this year anyway, Your Honor.

THE COURT: We seem to be cutting across every holiday New Orleans has.

MR. BENTLEY: Your Honor, one brief matter which I mentioned on behalf of my own client and perhaps others. What is the Court's attitude toward the defendant's ability to excuse himself with a waiver of presence during phases of the case which may or may not relate directly to him? the defendants do have a right to be present, but it seems to me there may be occasions during a trial when a defendant chooses to waive that right for whatever reason.

THE COURT: As long as he waives it and put it in writing that he chooses not be here and we'll rely on your being here to cover his constitutional right and all that, I have no problem with his not being here. I just don't want to hear that in some way, you know, he missed something or something along those lines.

MR. BENTLEY: Thank you.

THE COURT: Anything else, counsel? I'm sure you'll think of things as soon as we leave. I would appreciate it if—if now would be a good time, since you're all here and you have some time, why don't you take some time and look over those excuses and at least see what you plan to do about them.

If some of you want to come back, say, after lunch and [63] get more involved with them—what I need to know is who wants to do it and who is satisfied so I have on the record that we can start making responses. I just want to be clear that each of you feels comfortable that you'ave had enough input into the selection of the panel. You can do it right here in open Court if you want after I go. It may be

more comfortable here than in the jury room. You decide. But you have all the ones that we have at this point.

THE COURT: Anything else?

MR. RAWLS: Just a comment that I am registered at the Stouffer Madison and will be in town tonight and early tomorrow morning if anybody needs to see me about anything, and I would appreciate if the Court decides what the trial date is going to be a phone call or let me—I'll check with the Court before I leave town.

THE COURT: But don't leave, because I'm sure you're the one they do want to see about some of the matters that were discussed when you weren't present. And do you want to at least take a look at those excuses?

MR. RAWLS: I'm going to stick around. I'm just saying I'm in town and fully available until my plane leaves late tomorrow morning.

THE COURT: And, Mr. Rawls, you did say that you have a motion to be admitted?

MR. RAWLS: Motion to be enroll, yes, Your Honor.

[64] THE COURT: Okay. Ill take a look at that today. Okay. Court will be in recess.

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR86-202R

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

JOSEPH S. ASCANI, ET AL., DEFENDANTS.

VOLUME 1
PAGES 1-235

TRANSCRIPT OF PROCEEDINGS IN THE ABOVE-ENTITLED AND -NUMBERED CAUSE, BEFORE THE HONORABLE BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT COURT JUDGE, ON MARCH 2, 1987.

[2] THE CLERK: CR 86-202R, United States versus Joseph Ascani, et al. Counsel, please step forward and make your appearances.

MR. WESTINGHOUSE: May it please the Court. Bob Westinghouse and Tom Wales appearing on behalf of the United States.

MR. FROST: Good morning, Your Honor, Mike Frost appearing on behalf of defendant a Ascani.

MR. KANEV: Kenneth Kanev for defendant Olano, who is not present in Court yet, Your Honor.

THE COURT: Counsel, we should have an order. If you don't have an order, how are we going to do the rest of

the trial. Let's go. Mr. Bentley, you're up next.

MR. BENTLEY: Yes. Allen Bentley representing Brian Marler. May the record reflect his presence at this time.

MR. ROBISON: Your Honor, my name is Kent Robison. I represent Raymond M. Gray. He is present here.

MR. WEFALD: I'm Robert Wefald, representing David P. Neubauer and he is present in Court.

MR. KELLOGG: Terrence Kellogg, Your Honor, representing Davy Hilling, who is also present.

MR. RAWLS: Good morning, Judge. I'm John Rawls and I represent Stewart Kalterman, who is present in Court.

THE COURT: Counsel, we have a number of matters to [3] take care of, not the least of which is I believe there are some defendants that have not been arraigned on the superseding indictment, is that correct?

MR. WEFALD: That's correct, Your Honor.

THE COURT: Shouldn't we proceed with that before we do anything else?

MR. WESTINGHOUSE: That would perhaps be an appropriate thing to get out of the way, Your Honor. My record reflects there are four defendants who have not yet been arraigned on the superseding indictment. They are defendants Joseph Ascani, Stewart Kalterman, David Neubauer and Guy Olano.

THE COURT: Does that fit with counsel's—

MR. WEFALD: That's correct.

THE COURT: Could those four individuals approach the lecturn with their attorneys and we will proceed with an arraignment at this time?

MR. KANEV: Your Honor, I will alert the Court, my client is not here, and you may not want to do this twice.

THE COURT: No, I don't want to do it twice. Mr. Olano is not here. The marshals assure me he'll be here—why don't you go on back, counsel. We'll wait and do this—well, we'll figure out a way to do this before—while we're getting the jury impanelled. It's all going to come at the same time, but in any event, he should be here by 10:15, Mr. [4] Kanev, if you're getting worried, or did you hear the same word?

MR. KANEV: I heard nothing.

THE COURT: Let me fill you on what I've heard. There was a problem in the marshal's office. They let me know and they've gone to get him a while ago and he should be here between 10:00 and 10:15. I figured we had enough to discuss pretrial conference. It's not the kind of thing that I think requires his presence, or do you feel differently?

MR. KANEV: I'll take the Court's lead. That's fine.

THE COURT: Counsel, basically I thought that it might be a good time to check out a few of the motions in limine that need to be ruled on prior to opening statements, the first of which—not in any special order of importance, but just because it happens to be here in front of me, is I am not going to permit the—let me ask, Mr. Bentley, was it your motion on the—whose motion was it on the Pride Air inaugural video tape?

MR. BENTLEY: That was my motion, Your Honor.

THE COURT: Were you seeking to do that in opening statement?

MR. BENTLEY: Yes, Your Honor.

THE COURT: The motion is denied. That doesn't mean it's denied for trial, but I am not going to allow the tape to be played until I have a chance to see how much of it is [5] redundant and repetitive. When I've had a chance to see it, I will rule on how much of it can be played in the

course of the trial, but it's denied for purposes of opening statement.

As far as any of the motions in limine—I don't know how many of the motions in limine the government was going to address in its opening statement, I mean any of the subject areas contained in the motions in limine that you need a ruling on right now.

MR. WESTINGHOUSE: Your Honor, I believe that—Mr. Wales and I believe there are three matters that have been raised by motion in limine that we would ask the Court to address prior to opening statement. The first is the subject of the acquisition of Irving Savings. We had planned to spend a substantial period of time in our opening statement dealing with that acquisition.

THE COURT: I can rule on that immediately. I am overruling—I'm denying the motion in limine to exclude evidence on the acquisition of Irving Savings. In the Court's opinion it is relevant as background information for the jury to understand the nature in which these transactions—the background in which they occurred and it's clearly relevant.

MR. WESTINGHOUSE: There are two additional matters, Your Honor, which I would ask the Court to consider, the first of which relates to the motion of defendant Olano to exclude evidence with respect to regulatory action at Alliance [6] Federal. I am aware of no similar motion with respect to regulatory action at either Irving or Home, but we do need to dwell a bit on that particular aspect of the case.

The other area that I would ask the Court to consider at this time is the matter of the 404(b) evidence with respect to the forgery evidence as it relates to defendant Hilling.

THE COURT: As far as the regulatory action the Court can rule on that quite easily. I do think that that

is again not only relevant, but important for the jury to understand because it was against the background of that regulatory action that other actions took place and it was because of that action, at least the government alleges, that certain subterfuges may have been necessary, and so it certainly is relevant and the Court will deny that motion.

As far as the forgery is concerned, why is it necessary to refer to that in opening statement, counsel, let me just ask you?

MR. WESTINGHOUSE: Your Honor, I think the concern that may arise with the jury, if it is not addressed in opening statement, is how does this particular bit of evidence fit in, because it is clearly different and unique from all of the other evidence that they are going to be hearing, in the sense that it does not relate to a banking institution, nor does it relate to an event that is within the same time sphere. We concede both of those. We nevertheless believe [7] that it's relevant because of the pattern that it establishes in terms of the assignment dated September 7th, which is the subject of great concern with respect to the Alliance Federal letter of credit.

THE COURT: Mr. Kellogg, do you want to address that?

MR. KELLOGG: Yes, Your Honor.

THE COURT: Counsel, if I look around a lot, it's because it's an unusual seating arrangement, to say the least, and it is going to take a while to find you all. So if I say like Mr. Kellogg and kind of look over at two tables worth of faces—okay.

MR. KELLOGG: Your Honor, I think that on behalf of Mr. Hilling we pretty much set out our position in our memorandum, and that is that it's only the government's theory that makes it relevant. And what we're concerned about is if the Court in the balancing test, which is re-

quired of it, determines whether or not the probative value of that isolated incident five years remote in time is sufficiently strong enough to outweigh the prejudice, the obvious prejudice to Mr. Hilling, then of course it is going to come in.

We submit that it is such damaging evidence that it falls in that class of Mr. Hilling is guilty in this case because he admitted having forged a document five years prior, and it's exactly the type of extrinsic evidence which 404(b) does not permit, because its prejudice outweighs any possible [8] relevant inference which would serve to establish the government's case.

All they have to show is that Mr. Hilling—evidently it's the government's position that Hilling forged his own name on that document or caused another to forge their name, as I read their trial brief. The only way that they intend to establish that is by bringing in evidence of government performance bonds that Mr. Hilling, according to the FBI investigating agent, acknowledged having signed such a document with the name of another and caused another employee of his to do the same.

I submit that the prejudice far outweighs any relevance that that evidence could have.

THE COURT: Do you want to respond, Mr. Westinghouse?

MR. WESTINGHOUSE: Yes, Your Honor. Mr. Kellogg is indeed correct, that it is our theory that with respect to the assignment in question Mr. Hilling did cause his own name to be signed by another individual. That is the theory that we present that assignment for.

The evidence with respect to the performance bonds is relevant because it shows on a prior occasion Mr. Hilling doing exactly the same thing, both with respect to himself signing the name of the purported agent for the bonding

company and causing an employee to sign the name of an agent for the bonding company.

[9] We think that there could be no clearer evidence of the pattern, if you will, of this man using others and using themselves to sign the names of other individuals. In this case, it happens to be his own name, but because of the regulatory action there was a very clear reason why he did not want to sign his own name himself.

We believe that we can support that by evidence from another witness that in fact he contacted Mr. Hilling and caused the document to be forwarded from New Orleans to Bozeman to an address given to him as that of Mr. Hilling.

I would submit to the Court that the information with respect to the prior forgery is relevant. I would also indicate, however, that we can certainly not mention that in the opening statement and allow the Court to hear the evidence up until that point, if that would be a procedure that might make the Court more comfortable with the evidence.

THE COURT: Frankly, it would. I think this, unlike the other two, which obviously I had no problem with, I think this is a much closer question and I think the Court would be better informed if I were hearing the evidence up until that point, rather than rule in the abstract.

MR. WESTINGHOUSE: I will be prepared to delete that from my opening and we will then raise it at the appropriate time.

Your Honor, there is one additional matter that I [10] believe should be raised. In Mr. Kanev's motion on behalf of his client entitled "Defendant Olano's motion for order authorizing his limited participation as trial counsel," there is a paragraph on page two which reads, "We raise this issue not to imply that Mr. Olano is not in any way

dissatisfied with present counsel, but merely to express undersigned counsel's inability at this stage, anyway, to be properly prepared on some aspects of the case."

We are concerned about that statement in terms of a possible argument, if there is a conviction, of ineffective assistance of counsel down the road and we would ask the Court to inquire of Mr. Kanev as to his intended meaning with respect to that statement. If he is not prepared, then perhaps that is something we need to explore further, as opposed to leaving it open and then having the possible issue raised at a later point.

THE COURT: Mr. Kanev?

MR. KANEV: Thank you, Your Honor. The statement was correct when I set it forth in the motion and it's correct at the present time. In fact, it was only over the weekend, and this is after I saw the government's trial brief and was able to preliminarily respond to it with our motion in limine relative to the Alliance cease and desist order, that this area of the trial and its importance as far as the government is concerned became known to me.

[11] Briefly looking at the government's witness list, there are perhaps a half a dozen witnesses who have some affiliation with the Federal Home Loan Bank Board and at this point I can assure the Court that my client, being a lawyer and being a lawyer who is experienced in banking law, is in a better position to make inquiry of these witnesses.

As I pointed out in my motion, this trial promises to be fairly lengthy. I don't mean to slow things down in any way or create issues. I'm more than willing to proceed forward and this is with my client's understanding, so that as we get closer in time to these witnesses I can see whether I feel comfortable being in the position to cross-examine witnesses who may very well be key to the government's case against my client.

As I've suggested to the Court, the motion was made so at least the Court would have as good of a lead time as possible, given the fact that the issue surfaced in the government's trial memo, and if the Court would just consider the motion under advisement until the appropriate time or shortly there before that time, that's satisfactory and acceptable to us.

THE COURT: Fine, Mr. Kanev. It is. But I think that Mr. Westinghouse raises some concerns that the Court must address head on and that is you are prepared to go forward today, are you not?

[12] MR. KANEV: Yes, Your Honor.

THE COURT: If it should turn out – you know, one way of treating this is I can take it under advisement and we can see how things go. The other is that if I'm thinking of denying the motion, it might be a good idea that I let you know as soon as possible, so that you could start working with your client to glean from him the information necessary for you to cross-examine.

MR. KANEV: I can assure the Court I've been diligently working with my client for some time now, at least the last month that he has been in the Seattle area, and specifically on this subject matter area, so we're going to continue to do that and not assume that the Court will grant the motion.

THE COURT: That's what I need to know, Mr. Kanev. There are two questions about your state of preparedness: One, are you ready to go forward today, and the other is, assuming the Court denies your motion, are you ready to go forward today, assuming that you had to do the case in its entirety on your own?

MR. KANEV: If that's your ruling today?

THE COURT: If that becomes the ruling in the course of the case, would you be able to go ahead?

MR. KANEV: I don't know. I can't predict how well I will—or how confident I will feel in rather complicated [13] areas of banking regulation law. I just over the weekend read about these regulations 41Bs and all sorts of other regulations that apparently are going to surface during the course of the trial.

THE COURT: Is it a lack of time, Mr. Kanev, that's bothering you, because I assume that every lawyer in this room, to some extent, has to cope with the banking regulations.

MR. KANEV: I think it's more a lack of notice of the subject area and the emphasis of the government's presentation.

THE COURT: Are you telling the Court that you were unaware that these banking regulations would come into the case?

MR. KANEV: At some point in time I learned that there were cease and desist orders, but until I received the government's brief I didn't appreciate the full magnitude, as far as the case against my client was concerned.

THE COURT: Well, I don't know exactly when these issues are going to surface in the case, how far down the line. Mr. Westinghouse—

MR. WESTINGHOUSE: Perhaps I can be of assistance, Your Honor. We intend to proceed in more or less a chronological fashion and more or less in the order that is set forth in the trial brief. So with respect to Mr. Kanev [14] and the regulatory action as it relates to Alliance Federal I believe that we can safely say that it is not going to arise until the third or fourth week of trial at the earliest. We will be dealing with regulatory action but as it relates to Irving Savings and Home Savings during the first weeks.

MR. KANEV: With that proffer, again I go back to the position that I suggested to the Court in our motion,

and that was if the Court would just take the motion under advisement, hopefully we could deal with the issue when we got there.

THE COURT: I'm willing to do that, Mr. Kanev, but I think the concern is if we get there and the Court denies the motion, are you then going to claim that you are not prepared to go ahead? If that's a problem and if you're not prepared, I would just as soon face it today than face it mid-trial, because we do have a number of other people dependent upon this, and I don't want to be in the middle of trial faced with your saying, well, without my client participating I'm not prepared to cross-examine these witnesses.

MR. KANEV: I'm aware, as is the Court, of the law that says a defendant is entitled to a fair trial, not a perfect trial. I will follow whatever order the Court renders, and to answer Your Honor's question, if the motion is later denied I will go ahead representing Mr. Olano to the best of my ability.

THE COURT: Mr. Wales, you look like you want to [15] respond.

MR. WALES: Your Honor, I wonder if the Court would consider making inquiry of Mr. Olano when he arrives concerning his willingness as a defendant in this matter to going forward on this basis.

THE COURT: What are you suggesting if he says no, Mr. Wales?

MR. WALES: Then I think we have to proceed from that point, Your Honor. Our concern and the reason we raised this in the first instance is simply that we would like to avoid, if we can, going through the entire trial before the issue is raised.

THE COURT: Well, it seems to me that Mr. Olano has had the same amount of time to prepare for this trial as everyone else has had. It's true he has been out of the

district for a while, but his counsel has been down there to see him. He has been brought back here. There has been plenty of time for him to prepare. He is going to have three weeks at least before these issues come up, during which time he will be as an articulate individual able to inform his counsel, just the way any client does, what he knows about banking, so that his lawyer can intelligently cross-examine.

I mean, not every lawyer knows everything about everything at the beginning of the case. If you're representing somebody who has an esoteric area of expertise, [16] presumably the client educates the lawyer and that is what's going to happen, I assume, in three weeks.

What are my alternatives, counsel? Are you suggesting I ask Mr. Olano, Mr. Olano says no, I don't want to proceed, and I stop a trial that we're ready to go forward with or sever him and go to trial separately? I mean, is the government going to be willing to go along with that if he says no? Because I can tell you what the odds are that Mr. Olano will choose to go to trial today if I give him the choice. It may have nothing to do with the fact of how prepared he is for trial.

MR. WALES: Perhaps I misunderstood Mr. Kanev, Your Honor. I understood him to be representing to the Court that he and his client are prepared to go forward. It seemed to me simply a formality to ask his client but one which might well serve us in the end. Certainly we are prepared to go forward regardless.

THE COURT: Well, I can certainly inquire of Mr. Olano when he comes, but I—I will be happy to do so. But think we may be creating problems.

MR. KANEV: It's the government's concern, so that's fine with me, Your Honor. Your Honor, since it was my motions in limine that precipitated the Court's ruling on a

couple of these areas that we have gotten through in breakneck speed and acknowledging the Court's rulings on a couple of the areas, at [17] the same time may I perhaps be heard on the ruling of the Court with respect to the regulatory action that impacts Alliance and specifically my client?

THE COURT: The breakneck speed, Mr. Kanev, was due to the fact that I assumed that you had put most of your arguments in your brief and I've read your brief. If you have something in addition, please add it.

MR. KANEV: I do. Thank you, Your Honor. Your Honor, first of all—and in the brief I pointed out that—maybe it wasn't on that issue. Your Honor, I think you're entirely correct.

A couple of points, though. We do not contend that the government could not introduce evidence that the loans in which Mr. Olano is involved were substandard or violated regulations, okay? That's a basic principle. There's relevancy and, quite frankly, I don't think we could very well argue unfair prejudice that would inure to Mr. Olano.

What it is that we're objecting to, though, is—and the import of the motion—is to the admissibility and blanket admissibility of the existence of the cease and desist orders.

As I said, just over the weekend I was trying to get up to speed on the cease and desist aspect of the case. We've got an August 1982, essentially a voluntary cease and desist, and then a June 1984, where there is a stipulation and consent [18] enforcement order by the Eastern District of Louisiana, which incorporates the 1982, essentially, consent C and D.

What our argument is, rather than this blanket admissibility of having any number of Home Loan Bank Board witnesses testify that there were these C and Ds, we submit

that the government has to zero in and show specifically the relevance of how any one of the loans or credits or banking practices that are relevant in this case violated the C and D order consent of '82 and the Court imposed order of '84.

Based on the evidence—and again I only have an inkling of what the government has and it was gained primarily through their summary and their trial memo—based on the evidence that we're aware of at the present time we can see only very slight violations or alleged violations of these C and Ds and the only one I can focus on right now is perhaps that Reg. 41B, which deals with appraisals.

And in light of that, we are asking for a 403 balancing standard to be applied, and if the Court so applies the standard, we have to think, absent a further proffer by the government, that the Court is going to be in a situation of unfair prejudice to my client and perhaps others as well in this case.

THE COURT: Well, the Court's made its ruling, and that does mean, Mr. Kanev, that as the issues come up, if the government hasn't established some relevance in the course of [19] the trial, you won't have a right to object at the time, but I am not going to make the government right now go through a showing of proof of every regulation they're about to refer to. I think that is a unnecessary pre-trial proffer.

I think that based on what I've read it seems pretty clear to me that the government intends to restrict their proof to those regulations that set the background and set the stage for people trying to circumvent those regulations. If you think otherwise, the Court will give a limiting instruction or order to strike or will sustain an objection at the time.

Denying the motion in limine doesn't mean I'm ruling it's admissible; in other words, you still have a chance to object at the time.

MR. KANEV: Thank you, Your Honor. Your Honor, the second area that we touched upon is again our motion in limine regarding what the government characterizes as the looting of Irving Savings. I think that's what the Court ruled on. I didn't hear the "looting," but that was the rather descript term the government used in its brief, so that I have to focus in on that. I guess it's the acquisition and looting. I think it fell into that transition stage.

The Court's made its ruling, but I haven't heard anything in response to our fallback position, and that is that at the least, and I'm not saying that this is going to [20] clear any spillover prejudice or reduce the—I guess the purpose of our motion for severance, but we haven't heard from the Court whether the Court, as far as the other defendants in the case are concerned, whether the Court will give a limiting instruction, and what I proposed was—from what Mr. Westinghouse told me the first two weeks of the trial is really the rise and fall of Irving Savings, and what I suggest is when the government starts to go into Irving Savings a cautionary limiting instruction at the beginning of the testimony and then perhaps counsel can wave a flag or something when we have gotten through the transition stage—or I'll alert the Court, I didn't mean to be facetious. I can alert the Court when I think the Court might appropriately give the limiting instruction a second time to reinforce that with the jury.

THE COURT: Any objection to that, counsel?

MR. WESTINGHOUSE: Your Honor, I think the concern that I have with respect to that is that it sets a precedent which I do not think is appropriate through the course of the trial.

While it is true that we are going to be proceeding somewhat chronologically and by definition that means that we are going to be focusing first on the events at Irving and moving through then the events at Home and finally

through the events at Alliance, I don't think it's appropriate for the [21] Court to highlight in a conspiracy case this evidence applies to this defendant, this evidence applies to this defendant, this evidence applies to this defendant because that's in essence what Mr. Kanev is asking the Court to do.

Certainly when we have a particular rule of evidence that limits the admissibility of evidence, then it is appropriate for a limiting instruction; 404(b) evidence, for instance, hearsay evidence, for instance, where there is a statement of the defendant that may be admissible only against that defendant.

But where we're talking about evidence which deals with the genesis of the conspiracy, the formation of the conspiracy, which then the evidence will establish Mr. Kanev's client joined in progress, I think it's totally appropriate to have that evidence come in and to have that evidence presented to the jury without a limiting instruction.

So I would ask the Court not to make it a practice to give limiting instructions either with respect to the acquistion and looting evidence or with respect to any other evidence as it relates to single defendants.

THE COURT: Why don't we just say I'll take a look at it, Mr. Kanev, and think about it as it comes up, but I'm highly reluctant to give a limiting instruction of this nature before I've heard the evidence. That doesn't mean that maybe I wouldn't be inclined to give it at some point, maybe with [22] the rest of the jury instructions, but I'll think about it. Let me take another look at your proposed instruction.

MR. KANEV: The option it will leave me then is, I guess, at—when we've heard the testimony of each and every witness called by the government in the rise and fall of Irving Savings, I will be making the objection on relevancy known and renewing our request for a cautionary instruction.

THE COURT: Why don't you do that, Mr. Kanev, because it's very likely that in the course of trial I may forget, and feel free to remind me.

MR. KANEV: I hope I'll remember.

Your Honor, a couple of other areas. And my client has just arrived, it's 10:10, so he's missed everything we've spoken about up to now, but I will brief him with a couple of areas, although I guess we get into the area that the government has raised as far as representation.

I would suggest if—maybe I could have a little time to bring him up to where we are and it will save the Court time in the long run.

THE COURT: That would probably be a good idea, but as long as Mr. Olano is here maybe the thing we ought to do is go ahead with the arraignments, which I keep coming back to. It's something we shouldn't just forge ahead to trial without.

* * * * *

[320] THE COURT: Ladies and gentlemen, that brings us to the conclusion of the morning session. You are gonig to be excused now for lunch. I will remind you you must not be discussing the case amongst yourselves or with anyone else, nor are you to overhear or see anything in connection with the case in your comings and goings from the courtroom.

You may retire to the jury room. We will be starting promptly at 1:30. We have cut a little into your lunch hour. You'll just have to eat a little faster. But we will see you back here. You may retire to the jury room now.

Counsel, if you'll wait a moment, please.

MR. BENTLEY: Your Honor, may we be heard after the jury has left?

THE COURT: That's why I asked you to wait, counsel.

(Jury retires to the jury room.)

THE COURT: Why don't you all be seated? We have a number of matters to take up.

Mr. Kanev, did you have a matter you wanted to take up with the Court?

MR. KANEV: Yes, Your Honor. Your Honor, at the mid-morning break I was alerted at the last minute by Mr. Bentley, who could see through the door, there is a little glass pane in the door, and he saw jurors waiting outside. My client still had not arrived. He thereafter arrived in the custody of two uniformed building security guards.

[321] I just got to the vestibule when he arrived. In fact, the guards had removed the handcuffs from my client feet outside of the door, but the one guard still had the handcuffs in her hand, I saw them, I heard them, and, more importantly, at least two jurors who stood within two feet of me saw the same thing, and actually it's the juror in the far left seat, back row, the young man in the purple tee-shirt

today who actually said to the others when he saw these events, "Whoops, I think we'd better go back into the room," and at that point he ushered everyone else backwards, and as I say there were at least – I think they were lined up just that way, so the two people behind him I know for a fact saw because they were looking and they saw the incident, as I did. As far as whoever else saw it, I don't know.

Our position is we can't voir dire the jurors to assess the degree of prejudice that this would have in their minds, and I wonder whether any cautionary direction, such as the Court had given just moments before as they recessed, would unring whatever prejudice has been created.

I merely bring it to the Court's attention and I guess that's it. I would move for a mistrial in light of prejudice that I think must be engendered in the minds of at least three of those jurors, but, again, to make a record to show the prejudice I'm totally frustrated because just tactically I don't think that we want to explore that either

* * * * *

[428] THE COURT: That's it. Let me talk to the juror. You're right, there is case law. You have to all agree. If one of you doesn't agree, I'll just talk to the juror tonight. Okay. Easy. That will be taken care of.

Let me go on to some of the other matters. Mr. Kanev, what's the story, are you going to give an opening statement or aren't you?

MR. KANEV: I'm going to give an opening statement. I'm still wavering, but to give you an answer, that's my answer.

THE COURT: That's not simply just a matter of making up an answer. The government needs to get its witnesses lined up.

MR. KANEV: I've already spoken to Mr. Westinghouse. He said he could live with my wavering.

THE COURT: How much time do you need?

MR. KANEV: I think 45, and, again, 45 minutes to an hour is what I indicated to the Court yesterday.

THE COURT: Well, Mr. Westinghouse, if you can live with the wavering, that means you'll probably have someone here pretty early in the morning ready to go, either way.

MR. WESTINGHOUSE: Yes, Your Honor.

THE COURT: Let me just deal with one other thing. There is not going to be court on Friday, but what I would like to give you a little bit of warning about, there is a [429] possibility that after I excuse the jury on Thursday we may stay a little late and I'll try to deal with some of the motions in limine and just take some time with yhou that we never have at the end of the day, but Thursday we could stay late. I just didn't want anyone to make any plane arrangements for, like, 5:00 or 5:30 or something like that.

Okay. The other matter I will put off taking up at this time is the question of the motion for mistrial because I really need to get more information on what exactly took place out there. I've heard a bit of a different version, Mr. Kanev. That is not to doubt what you're telling me. It's to doubt in the haste of your going out there that you may have seen something that was not exactly accurate. It's my understanding that – let me find out before I even go into what it's my understanding of, if there is another side or what the story is, and I don't have time to do that today for obvious reasons. I didn't want to take any time out from opening statements.

The other matter I want some help on, Mr. Olano, because you're the person who's involved, though it's not your fault, in the breaks do you need to go back downstairs?

DEFENDANT OLANO: Not on all breaks, Your Honor. On some breaks I do.

THE COURT: I mean, couldn't you take care of whatever you need to do up here like everybody else?

[430] MR. KANEV: We actually requested that yesterday and I saw Guy ushered out. I don't remember who it was. They wouldn't let him stay here.

THE COURT: Okay. I would like – I'll talk to the Marshal's Office about this. So far they have been late in bringing you up at every break and the Court cannot have that and it's not your fault, and although I said I'll start without anybody else who came late, it doesn't seem fair to you, Mr. Olano, to do that if it's not your fault you're late. I've spoken about it. It's not been cured. So I think the only solution will be for you to stay up here on the breaks and if the marshals need to take a break, they will have to do it in a different setting. But we're going to just take care of this now.

Well, counsel, I think that takes care of us for the day. What have we got, we've got probably – I counted 15 minutes, Mr. Robison, Can you do it in 15 minutes?

MR. ROLBISON: I'll shave it down. I'll be 15 minutes.

THE COURT: Okay. That's all I count that you have left, though I will say this, I know you haven't wasted a minute. It's been a very full hour and a half and I appreciate that. But the way I kept the time you've got about 15 minutes left, give or take a couple of minutes, if you want to wrap up.

[431] We'll start out with your – the end of your opening, and Mr. Bentley, you've got 45 minutes to an hour?

MR. BENTLEY: Yes, Your Honor.

THE COURT: Maybe Mr. Kanev has 45 minutes to an hour.

MR. KANEV: I answered affirmatively.

THE COURT: Nobody will be upset if you change your mind.

MR. KANEV: Thank you.

THE COURT: It certainly seems as if we'll wrap up openings tomorrow morning and then go on to putting on evidence. Let me take a recess now so I can talk to our juror. See you back here tomorrow, counsel.

(In chambers.)

THE COURT: Mr. Griffin, you must be tired. I've read your request, Mr. Griffin. I don't know how I can emphasize to you the problems it will cause in this case.

JUROR GRIFFIN: In that case I will just have to work it out. .

THE COURT: Why don't I suggest something to you. Will it be a help to you if I wrote your employer?

JUROR GRIFFIN: No, it's in the contract. I belong to the Teamsters and I thought they paid full time. I should have checked it before I came. They pay two weeks per contract year.

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[10399] MR. RAWLS: I want them in there, Your Honor.

THE COURT: You want pictures or sounds in there?

MR. RAWLS: I want the whole phrase, yes, ma'am.

MR. WEFALD: I thought the problem with 18 and 31 was the penalty and not the other language.

THE COURT: That's right, but as long as I was going through and changing it, it struck me that "signs, signals, pictures or sounds" had little to do with the case, but if somebody wants it, by all means we'll leave it and we'll just change the penalty.

Okay. What I've done in 13, counsel, is basically I've inserted—I guess it would be line 8, fifth, you know, underlined, just like the others are underlined, the fifth element is described in instruction 14, and as long as we're doing this over we're going to clean up line 16 and 17 and give them a fresh copy. Is there any problem with that?

MR. FROST: Is there any conflict between the language about certain elements being required to be proved beyond a reasonable doubt and one of them being required to be—

THE COURT: I suppose you could say there's—I mean, maybe you'd better read 13 through and see if that creates any conflict, because 14 makes it very clear that the fifth element only has to be proven by a preponderance.

MR. KELLOGG: 13 still says on the first page at line 10 that—

[10400] THE COURT: Yes, we'd better leave that. That's going to be confusing.

MR. KELLOGG: It makes sense, because when read in conjunction with 14 they have four beyond a reasonable doubt and one by preponderance.

THE COURT: Yes, but then you don't say it—why don't we say "and the fifth by a preponderance of the evidence." I think you'd have to say that. All right?

MR. WESTINGHOUSE: That's fine, Your Honor.

THE COURT: Okay. I think we'll just have to read that through again and make sure that it all follows.

My next area, before you go—I know you're raring to go. My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just to sit in on deliberations.

It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps [10401] people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

I think the last matter is—Mr. Frost, you had an objection to put on the record?

MR. FROST: Yes, Your Honor, I have two brief matters. First of all, on behalf of Mr. Ascani I would move for a mistrial on the ground that the government misstated the evidence during the course of the summation, specifically with respect to indicating to the jury that Mr. Ascani had brought the Tahoe Marina Development Loan papers to Seattle.

There is absolutely no evidence to that effect at all and I

would submit that was a misstatement of the evidence, it's very prejudicial to Mr. Ascani. I would move for a mistrial on that basis, as well as for the inflammatory remarks by counsel at the end of the summation, which essentially brought in issues that are broader than the guilt or innocence of those defendants into this trial, by suggesting that they shouldn't be allowed to get away looting financial institutions of this country.

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[10608] more defendant's closing arguments and you still have the government's rebuttal remarks, so you must not be discussing the case with anyone or amongst yourselves.

See you back here tomorrow, you may retire to the jury room. Counsel, wait a moment, please.

(Jury retires to the jury room.)

THE COURT: Why don't you be seated, counsel. Frankly, Mr. Bentley, it struck me that they've heard about enough for the day. I think they probably will be better able to concentrate tomorrow morning. It would have gone till 5:00. As it turns out, counsel, in my figuring, it's six of one, half a dozen of the other, whether we take care of our business now or take a prolonged lunch hour tomorrow, which is what we would have had to do because we do have some matters to take care of. One is alternates. Have you all given some thought to—I hope you have given some thought.

MR. FROST: I'm sorry?

THE COURT: Alternates. Remember?

MR. ROBISON: I'd kind of like an opportunity, as I'm sure the government would one more time before we make that choice, to eyeball the jury. Can we do it after the argument is completed? We will be ready after the argument is completed to do it.

THE COURT: One of the reasons I recessed early was to—you want to wait. Well, let me make a suggestion. then, [10609] why don't you do it during the lunch hour.

MR. ROBISON: Fine by me.

THE COURT: You want to do it at the end of your—

MR. WESTINGHOUSE: Well, I'm only trying to—

THE COURT: You want to get one more—

MR. WESTINGHOUSE: What I want to do is use the lunch hour time to organize my thoughts based on—

THE COURT: You don't have to worry about their doing—you can pick your alternates tonight. You may have a pretty good idea of who you want your alternates to be.

MR. WESTINGHOUSE: We will be prepared to submit our name tomorrow, Your Honor.

THE COURT: You don't have to stay here. I don't want to cut into your lunch hour.

MR. WESTINGHOUSE: No, that's fine.

THE COURT: But you may not feel the need to eyeball the jury again the way the defendants do, in which case you can pick your name tonight.

MR. WESTINGHOUSE: We do need to chat among ourselves a bit more, so if we would have until tomorrow.

THE COURT: Now, the second question is have you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

MR. ROBISON: We would ask they not.

THE COURT: Not. Also somebody referred to the [10610] pictures going to the jury. I forget—somebody did.

MR. KELLOGG: I did because there is a notebook there, Your Honor.

THE COURT: Well, does that mean I don't hear any objection to that notebook going back in? The problem is I gather defendants didn't take pictures, at least some of the defendants didn't take pictures of their witnesses. Now, they're not going to forget what the defendants look like because they have stared at them for three months. Do you care? Some of these people are people that defendants have ended up using and referring to quite a bit, too.

MR. FROST: I haven't seen the photographs myself yet. Maybe we could check that to see what the witnesses are dressed like.

THE COURT: Dressed like? Why don't you take a look now, Mr. Frost.

I'd like to get something out of way tonight, counsel, for having sent the jury home, so we don't leve everything until tomorrow.

Counsel, let me just raise one problem and it's a little different than—we usually have simultaneous challenges here, that means you go at the same time.

It occurs to the Court there may be a problem there, because what if you both challenge the same juror? Then I'm left with 13 jurors.

[10732] It wins with not guilty. It wins with any verdict that you come back with with which you can live.

Please give us fair and honest consideration of the believable evidence. Please give us a fair and honest application of the law. I can ask no more than that on behalf of Ray Gray, his wife, his daughter. Thank you, and have a good life.

THE COURT: And on that note, ladies and gentlemen, we reach our recess for the noon hour, though it's not the noon hour any more. It is past that, but I did promise you an hour and a half for lunch and I'm going to keep that promise. That means you will be back here, ready to go by 2 o'clock and you will at that time hear the Government's rebuttal remarks, and as I assured you, you will be receiving the case today for your deliberation at the conclusion of the Government's rebuttal remarks.

Remember, arguments are not over yet. You must not begin discussing the case amongst yourselves until I actually give you back those jury instructions and tell you that you may begin your deliberations. You must not be discussing it amongst yourselves or with anyone else. See you back here at 2 o'clock.

Counsel, if you will wait a moment, please.

(The following proceedings occurred out of the presence of the jury:)

[10733] THE COURT: Counsel, have a seat.

That brings us to the conclusion of defendants' closing arguments. You will have an hour and a half, Mr. Westinghouse, to respond. Are you going to split it?

MR. WESTINGHOUSE: No, I am going to do it, but I thought I had two hours.

THE COURT: No, no, no. I mean an hour and a half to prepare.

MR. WESTINGHOUSE: Yes.

THE COURT: I don't want to take your time. Do you have your alternate's name? Do you want to give me a slip with it before you leave?

MR. WESTINGHOUSE: Your Honor, we need to discuss it for just another moment.

THE COURT: How about you all?

MR. ROBISON: Can we discuss it over the lunch hour and submit it after lunch, Your Honor?

THE COURT: Yes, but really do it, because at the conclusion of the Government's case, I've got to say something or fourteen people are going back in that room. Otherwise I send fourteen people back in while you decide and that's usually not something anybody wants me to do, because we're going to start sending exhibits in and the whole works.

MR. ROBISON: We'll meet right now.

[10734] THE COURT: Okay. You can all stay here as long as you need to to take care of it.

See you back here at 2 o'clock.

(Noon recess.)

* * * * *

[10735] AFTERNOON SESSION

(2 p.m., May 28, 1987)

(The following proceedings occurred out of the presence of the jury:)

THE COURT: I worry when I hear you all having this much fun, Counsel. Maybe you've decided to stay here another week or two.

Yes, Mr. Bentley?

MR. BENTLEY: Just for the record, Your Honor, there were four Marler exhibits, 1886, 1887, 1888 and 1889, including all of the sub-exhibits within those series, which I believe we had an understanding could be admitted. The Government indicated no objection to them on foundation bases.

However, there has been some confusion with the clerk as to whether these were formally offered or not, and I note that yesterday they were not indicated as received but they are now indicated as received, based on an informal representation that I made to the clerk. In order to make sure that the record is clear on this point, I do formally offer them at this time.

MR. WESTINGHOUSE: No objection.

THE COURT: Hearing no objection, they will be admitted.

[10736] (Defendant Marler's Exhibits Nos. 1886, 1887, 1888 and 1889 for identification received in evidence.)

THE COURT: Well, Counsel, I received your alternates. Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?

Okay. Do you want me to instruct the two alternates not to participate in deliberation?

MR. KELLOGG: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

THE COURT: I want to explain to you another instruction I'm going to give to the jury, assuming I remember between now and the two hours yet to come, so that you understand it and aren't mystified when you hear it.

This jury will be deliberating in Judge Beeks' courtroom at the end of the hall. It's a small courtroom but a big jury room. They will have tables and chairs and other tables for the exhibits. They'll have a coffee pot and it will be very

comfortable, much more comfortable than they would be in here with all the exhibits. But what we plan to do is give them—for those of you who don't know, Judge [10737] Beeks is now retired. He never comes in any more. His chambers are really virtually empty.

We are going to give them access to the chambers so they can use the facilities and have a refrigerator and be comfortable. If I give them an instruction that says not to look at any of the books in the chambers, you will understand what I mean. There is a set of the United States Code. We are taking 18 USC out of the set, so you don't even have to worry about it if they should decide to peek.

MR. ROBISON: Title 12, too. It's all banking.

THE COURT: All right. We'll take Title 12 and Title 18 out. But even so, I think I will give them that additional instruction. I think by now most of the books have been removed, but we do know there is this one set left. I just want you to understand when I give that instruction why I'm giving it so you're not all kind of mystified by it.

Well, have you told each other who your alternates are?

MR. WESTINGHOUSE: Yes, Your Honor.

THE COURT: Okay. I'll announce it at the end. I'm kind of glad you reached that decision, Counsel. I kind of think they deserve it. They really have been just a superb jury, and I think they'll be glad.

Well, Mr. Westinghouse, are you ready to go?

MR. WESTINGHOUSE: Yes, I am, Your Honor.

[10738] MR. FROST: There is just one thing, Your Honor. I don't remember if any of the instructions indicated they would not be provided with a transcript of the testimony of witnesses. It has been a long trial and I'm sure that's going to be the first question that comes out.

THE COURT: It's going to be the first question. I would be inclined to answer it, "Rely on your collective

memories." I am sure you're all going to be in favor of that because once we start giving them one witness, they could be here forever.

They don't realize that when they ask. They think it's just a nice innocent request, and of course we have the transcripts handy—the fact of the matter is, we may not have the transcripts handy. Then we're going to be in a position where they're waiting for that. So if you're all agreed, I could either wait until the first question from them and just write out the answer at the time without even calling you, or I could give them the instruction now. Either way. I would give it to them orally. I saved three to read to them at the end. Why don't I just give it to them now?

MR. FROST: It seems to make sense to do it that way.

THE COURT: Okay.

(The following proceedings occurred in the presence of the jury:)

* * * * *

[10801] few minutes to get all of that together, especially since we are not going to be putting it in this jury room, you will be glad to know, but in a room that will have a great deal more room for you and the exhibits to coexist side by side.

Now, where you are going we hope will be very comfortable for you. We anticipate it will be. You will have access to some other rooms as well as the room you're going to be deliberating in. I just want to advise you in those other rooms there may be some law books. In case you're curious, they are the chambers of the senior judge who has now retired. You will see it's right at the end of this hall. There may be some law books still left in there.

You are not to look at them. You are not to consult them for any reason. Remember, I've told you so many

times – I'll tell you once more – your decision can only be based on the evidence in this case and the law as I have given it. But since they will be there, I just want to make sure you remember that.

Often in a case of this dimension, one of the first questions the Court receives from the jury is "Can we see transcripts of testimony?" Let me save you some time. Don't send out the question because the answer will be "You must rely on your collective memories of the testimony." You've seen counsel refer to transcripts. They are portions, a drop in the bucket of what it would take to transcribe all [10802] the testimony in this case. Most of what you would ask for wouldn't even be transcribed yet. And to start transcribing, you'd be here for a very, very long time.

also, it does give emphasis to one portion and not another, and you've had the ability to take notes and you're going to have to rely on your collective memories. Each of you has his or her own notes and I sort of will tell you that we would probably deny any request. If you feel absolutely compelled to ask me, ask me, but for the most part, I suggest that you rely on your collective memory.

One other matter. We have indicated to you that the parties would be selecting alternates at this time. I am going to inform you who those alternates are, but before I do, let me tell you, I think it was a difficult selection for all concerned and since the law requires that there be a jury of twelve, it is only going to be a jury of twelve. But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to

step in having heard the deliberations. But we are going to ask that you not participate.

The alternates are Norman Sargent and Shirley Kinsella. [10803] I am going to ask at this time now, ladies and gentlemen, that you retire to the jury room and begin your deliberations. We will let you know as soon as the time for the big move comes from this room to the other room. You might want to collect your belongings after you've selected your presiding juror.

If you will retire to the jury room, please.

Counsel, if you would wait a moment.

(At 4:14 o'clock p.m., the jury retired to commence deliberations.)

THE COURT: Counsel, have a seat.

We just have a few matters to take care of. Before we go any further or do anything else, would Mr. Kanev and Mr. Rawls hand in their right to testify forms?

MR. KANEV: Yes. In that regard, Your Honor, my client has signed the document. I pointed out that in it he has interdelineated with my knowledge and approval the reason why he didn't. It dealt with the Court's rulings on his prior adjudication, and last week I told the Court that I would submit a written proffer in that regard.

After consulting with my client, we have decided that I would not, just so that the record is complete, and we would stand on the statement as made on that document.

* * * * *

[10807] MR. RAWLS: Yes, ma'am.

THE COURT: Mr. Kanev, you will be available for questions?

MR. KANEV: I'll be available. My client wishes to waive his presence, given his custodial situation. I am going to handwrite a waiver which I will sign and hand to the clerk.

THE COURT: Okay. Is he going to be moved back?

MR. KANEV: No. He's going to be local, but he would rather remain in Kent. There is a writ in progress, another problem, but we're trying to work on that; a writ in progress from Louisiana.

THE COURT: Okay. Well, I trust before you all leave you'll give me those.

My next question to all of you is the stipulations. Anybody have any strong feelings whether they should go or should not go? They ordinarily, I guess, do not go, but if you want them to go, they will go.

MR. RAWLS: I would suggest they not go unless they be requested. I think these people have been taking notes. Ordinarily jurors do not take notes. These people obviously have their notes.

THE COURT: Hearing nothing else, they will not –

MR. BENTLEY: I'm sorry. Nothing else about

Supreme Court of the United States

No. 91-1306

UNITED STATES, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ORDER ALLOWING CERTIORARI.
Filed May 18, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

May 18, 1992

(4)

No. 91-1306

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

JOEL GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether allowing alternate jurors to be present during jury deliberations is automatic reversible error, even when the defense consents to that procedure.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1306

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 934 F.2d 1425.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1991. A petition for rehearing was denied on October 18, 1991. Pet. App. 33a. On January 7, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 15, 1992. The petition was filed on February 11, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Criminal Procedure 24(c) provides:

> **Alternate Jurors.** The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. * * * An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Federal Rule of Criminal Procedure 51 provides:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

Federal Rule of Criminal Procedure 52 provides:

> (a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following a three-month trial in the United States District Court for the Western District of Washington, a jury convicted respondents of conspiring to defraud the United States by defrauding several thrift institutions, in violation of 18 U.S.C. 371; willfully misapplying federally insured funds, in violation of 18 U.S.C. 657; making false statements in connection with a federally insured lending institution, in violation of 18 U.S.C. 1006; and transporting stolen money in interstate commerce, in violation of 18 U.S.C. 2314. Respondent Gray was also convicted of wire fraud, in violation of 18 U.S.C. 1343, and respondent Olano was also convicted of making a false statement on a loan document, in violation of 18 U.S.C. 1014. Respondents were each sentenced to 15 years' imprisonment, to be followed by five years' probation, and they were ordered to pay restitution. See Pet. App. 2a, 4a-5a.

1. The evidence at trial showed that Olano was the chairman of Alliance Federal Savings and Loan Association in Kenner, Louisiana. Gray was the chairman of Home Savings and Loan Association in Seattle, Washington. Along with several co-defendants, Gray and Olano engaged in an elaborate scheme to defraud the savings and loan institutions they controlled by making a series of unauthorized loans and fraudulent extensions of credit, and by paying kickbacks from loan proceeds. Pet. App. 3a-4a.

2. During pretrial proceedings, the parties agreed that 14 jurors would be chosen at the outset of trial, with two of the 14 to be designated as alternates at the close of the case. See J.A. 20-23; Feb. 5, 1987, Tr. 17-22. At that time, each side would select one juror to be an alternate. That procedure was fol-

lowed, and a total of 14 jurors were chosen. All 14 were treated alike throughout the trial.

At the end of trial, the district court suggested that the two alternate jurors be allowed to remain with the jury during deliberations. The court told the parties:

> [I]t's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just sit in on deliberations.
>
> It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

J.A. 79; Tr. 10,400.

Later that day, counsel for Gray expressed reservations about the court's proposal. The following colloquy occurred:

> THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?

> MR. ROBISON [counsel for Gray]: We would ask they not.
>
> THE COURT: Not.

J.A. 82; Tr. 10,609. The next day, however, the court determined that the defendants did not object to permitting the alternates to retire with the jury. The court said:

> THE COURT: Well, counsel, I received your alternates. Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?
>
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
>
> MR. KELLOGG [counsel for co-defendant Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

J.A. 86; Tr. 10,736.

After that discussion, the district court instructed the jury. At the end of the instructions, the court explained that two of the jurors would be designated as alternates. The alternates, the court explained, would be allowed to retire with the jury, but would not be permitted to participate in the deliberations. J.A. 89-90; Tr. 10,802-10,803. The court then told the jury for the first time which of the jurors were the alternates. *Ibid.* The jury retired to deliberate, accompanied by the two alternates. One of the alternates later asked to be excused, and the district court granted the request. The other remained with the jury until it reached a verdict. Pet. App. 7a n.7.

3. The court of appeals reversed. Pet. App. 1a-32a. The court noted that Fed. R. Crim. P. 24(c)

requires the district court to discharge the alternates when the jury retires to deliberate. The court therefore held that the district court's failure to discharge the alternates violated Rule 24(c). Pet. App. 30a.

The court acknowledged that neither respondent objected to the district court's decision to retain the alternate jurors after the jury retired to consider its verdict, Pet. App. 22a, and it assumed, *arguendo*, that counsel for co-defendant Hilling spoke for all the defendants when he specifically consented to the procedure, *id.* at 27a. The court further recognized that, because respondents did not object to sending the alternates into the jury room, the district court's action was reviewable only under the plain error standard. *Id.* at 22a-23a. Nonetheless, the court of appeals held that permitting alternates to be present during deliberations is plain error, because it "inherently" prejudices defendants by "infring[ing] upon the jury's privacy and the secrecy of the jury process." *Id.* at 28a. The court stated that it could not determine whether the alternates had obeyed the district court's instruction not to participate in the deliberations. Moreover, the court added, even if the alternates attempted to follow the court's instructions, their "attitude[s], conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *Ibid.*

The court acknowledged that a defendant can waive his objection to a violation of Rule 24(c), but only if the defendant himself, rather than his counsel, personally consents on the record to the procedure. Because "[n]othing in the record suggests that the defendants intelligently and knowingly consented personally to a waiver of their rights under

the Rule," the court held that there was no waiver in this case. Pet. App. 27a-28a.

In sum, the court held that "[a]bsent a valid personal waiver by the defendants, allowing alternate jurors to be present during jury deliberations * * * requires reversal." Pet. App. 30a. Although respondent Olano was the only defendant who raised the issue on appeal, the court applied its ruling to respondent Gray as well to avoid a "manifest injustice." *Id.* at 30a-31a.[1]

SUMMARY OF ARGUMENT

The district court in this case violated Rule 24(c) of the Federal Rules of Criminal Procedure by permitting the alternate jurors to observe the jury's deliberations. Respondents failed, however, to object to the Rule 24(c) violation, and in fact the record indicates that their counsel consented to the procedure.

The court of appeals recognized that, because of respondents' failure to object, the Rule 24(c) violation was reviewable on appeal only for plain error. The plain error doctrine creates a narrow exception to the contemporaneous objection rule, one that is to be applied only when a miscarriage of justice would otherwise result. To satisfy that standard, a reviewing court must find that the claimed error not only seriously affected the defendants' rights, but also that it had an unfair prejudicial impact on the trial.

The error in this case did not remotely satisfy that standard. The court of appeals found plain

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[1] The court of appeals also held that there was insufficient evidence to support respondents' convictions under 18 U.S.C. 1006. Pet. App. 13a-17a, 18a-20a. That ruling is not before this Court.

error in this case by concluding that permitting alternate jurors to observe jury deliberations is "inherently prejudicial," and that it requires reversal in every case, regardless of whether any specific prejudice flowed from the error. That conclusion, however, reflects a serious misapplication of the plain error doctrine, and it confuses harmless error and plain error analysis. Even if the court of appeals were correct that the error in this case was "inherently prejudicial," that would demonstrate only that the error is among the few errors in trial procedure that are not subject to harmless error analysis under Fed. R. Crim. P. 52(a). But the harmless error and plain error doctrines serve different purposes, and the fact that a particular error can never be harmless within the meaning of Rule 52(a) does not mean that such an error is always "plain" within the meaning of Rule 52(b).

In any event, the court of appeals erred in concluding that the procedure followed in this case was inherently prejudicial. There is as much reason to suppose that the alternate jurors favored acquittal as conviction, and the increase in the number of jurors in the jury room probably favored the defense, since a larger number of jurors generally makes conviction less likely. Moreover, there was no constitutional infirmity in permitting the alternates to observe the jury deliberations; even if the alternates are regarded as extra jurors for that purpose, this Court has never suggested that the Constitution imposes a maximum limit of 12 on the size of a jury.

The court of appeals also erred in holding that the presence of the alternates in the jury room requires reversal because it resulted in an invasion of the privacy of the jury's deliberations. In virtually every respect, alternate jurors are indistinguishable from

regular jurors. They are subject to the same selection process as regular jurors, have the same qualifications, take the same oath, and, until the beginning of deliberations, perform exactly the same functions. It is therefore unrealistic to characterize the alternate jurors as strangers to the jury in the way that a true outsider to the process would be.

Finally, there is no basis for the court of appeals' conclusion that respondents' personal consent was necessary for an effective waiver of their right not to have alternate jurors present during deliberations. With respect to most rights of the defendant in the criminal justice process, the defendant's attorney is authorized to make decisions that result in the forfeiture of those rights without the need to obtain a record recital of the defendant's personal and informed consent. Although this Court has recognized exceptions to that rule, the exceptions all involve decisions that have sweeping consequences for the defendant, such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury.

The decision to permit alternate jurors to retire with the regular jurors during deliberations is not the sort of fundamental trial decision that the defendant must make personally. In concluding otherwise, the court of appeals noted that requiring personal consent from the defendant "alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of his case." Pet. App. 26a. We doubt the validity of that proposition, but in any event, the same thing could be said of countless other decisions at trial that are undoubtedly subject to waiver by counsel. Nothing about the decision at issue in this case made it improper for that decision to be made by counsel, as the defend-

ants' representatives, rather than by each defendant personally.

ARGUMENT

RESPONDENTS FORFEITED THEIR RULE 24(c) CLAIM BECAUSE THEY DID NOT OBJECT TO THE PRESENCE OF ALTERNATE JURORS IN THE JURY ROOM DURING DELIBERATIONS

We agree with the court of appeals and respondents that the district court violated Rule 24(c) of the Federal Rules of Criminal Procedure when it failed to discharge the alternate jurors at the time the jury of 12 retired to deliberate. Rule 24(c) provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." The Rule does not authorize the district court to follow a different course if the parties agree; we therefore acknowledge that permitting the alternates to retire with the jury during deliberations was error.

The dispute in this case is over the consequences of that error. We submit that the court of appeals was wrong in concluding that the failure to discharge the alternate jurors was plain error that required reversal of all of respondents' convictions. In our view, the error in this case did not approach the level of plain error. By failing to interpose a contemporaneous objection, respondents accordingly forfeited their right to object to that error on appeal and seek relief based on that claim.

A. Respondents Failed To Object To Permitting The Alternate Jurors To Retire With The Jury

The court of appeals found that respondents' counsel did not object to the presence of the alternates in the jury room during deliberations, Pet. App. 22a,

and it assumed, *arguendo*, that counsel for a co-defendant spoke for all the defendants when he specifically consented to the procedure, Pet. App. 27a. The court was clearly correct in finding that respondents did not object to the procedure, and the conclusion that counsel for a co-defendant spoke for the other defendants, including respondents, when he affirmatively consented to the procedure is virtually compelled by the record.

When the district court first raised the idea of permitting the alternate jurors to "sit in on" jury deliberations, counsel for Gray stated, "We would ask that they not." J.A. 82; Tr. 10,609. The next day, however, the district court addressed counsel for all the defendants and said—apparently referring to an earlier, off-the-record conversation—"I understand that the defendants now * * *. You do all agree that all fourteen deliberate." No one disagreed with the court's characterization of the defendants' position on the matter. The court then asked, "Do you want me to instruct the two alternates not to participate in deliberations?" Pet. App. 6a. The only response was a statement by counsel for co-defendant Hilling that "It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations." J.A. 86; Tr. 10,736. Although the district court had earlier made it clear that the alternates would not be permitted to retire with the jury if there was any objection ("[I]f there is even one person who doesn't like it we won't do it." J.A. 79; Tr. 10,400), none of the defendants raised an objection at that time. Pet. App. 6a-7a.

B. The Contemporaneous Objection Rule Bars Respondents From Obtaining Review Of Their Rule 24(c) Claim

By failing to object in a timely fashion, respondents forfeited any claim of error based on the composition of the jury during deliberations. As this Court has explained, "[n]o procedural principle is more familiar to [the] Court than that a * * * right may be forfeited in criminal as well as civil cases by the failure to make [a] timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991); *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 238-239 (1940). Federal Rule of Criminal Procedure 51 embodies that principle, providing that an error is preserved for appeal only if the party "makes known to the court the action which that party desires the court to take or that party's objection to the action of the court." [2]

[2] Rule 51 sets forth a rule of forfeiture, not waiver, although the courts occasionally speak in terms of a defendant's "waiver" of a legal claim. See Paul T. Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DePaul L. Rev. 753, 757-758 (1980). The term "waiver" can be confusing in this context, because it sometimes is used to refer to the intelligent and knowing relinquishment of a right. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The forfeiture principle in Rule 51, however, does not depend on the defendant's state of mind when he failed to raise an issue in the trial court. See *United States* v. *Gagnon*, 470 U.S. 522, 527-528 (1985); *Wainwright* v. *Sykes*, 433 U.S. 72, 82-91 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 508 & n.3 (1976). Rights may be forfeited for failure to object both advertently and inadvertently.

The contemporaneous objection rule promotes judicial economy by bringing the claim of error to the trial court's attention and providing the court an opportunity to resolve the matter as the defendant wishes. See *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977); *United States* v. *Gagnon*, 470 U.S. 522, 529 (1985); *Luce* v. *United States*, 469 U.S. 38, 41-42 (1984); 3 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 26.5, at 251 (1984). That was undoubtedly true in this case, in view of the trial court's explicit statement that it would not permit the alternates to retire with the jury if even one of the defendants objected. Pet. App. 5a n.5. If respondents, or any of the other defendants, had objected to the court's proposal, the court would not have allowed the alternates to retire with the jury, and the matter would never have become an issue on appeal.

The contemporaneous objection rule also requires the parties to declare the action they want the court to take. It thereby reduces the risk of manipulation by a defendant who pursues one course at trial for tactical reasons and later claims that the course followed by the court was reversible error. See 3 Wayne R. LaFave & Jerold H. Israel, *supra*, at 251; see also *Wainwright* v. *Sykes*, 433 U.S. at 89; *Luce* v. *United States*, 469 U.S. at 42; *Estelle* v. *Williams*, 425 U.S. 501, 508 (1976). That factor is also present in this case. The district court told all the defendants to think overnight about whether they objected to including the alternates in deliberations. The next day, the court determined on the record that the defendants did not object to the alternates' presence as long as the alternates were instructed not to participate in the deliberations. The court then gave that instruction and permitted the alternates to retire with the jury. No complaints or reservations

were heard from the defendants until they were convicted and the case was on appeal.[3] Under those circumstances, the court and the prosecutor should have been entitled to assume that respondents had abandoned any objection to allowing the alternates to accompany the jury during deliberations.

Courts are particularly reluctant to permit attorneys to request or agree to a particular procedure and then on appeal invoke the error as a basis for reversal. See *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990) ("Having persuaded the court to adopt their proposal, rather than the government's, defendants should not be allowed to circumvent the judicial process by challenging on appeal the trial court's decision to adopt it."). To recognize such claims would provide an incentive to inject error into the proceedings in the hope of creating an issue that could be raised on appeal in the event of a conviction. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). Moreover, when a defendant or his counsel agrees to or acquiesces in a particular course of action at trial, it is clear that the parties have adverted to the issue and that the failure to object is not the product of negligence or inattention on the part of counsel. See *Estelle* v. *Williams*, 425 U.S. at 510. For those reasons, defendants like respondents who agree to a particular procedure, even more than defendants who merely fail to object, should forfeit the right to claim on appeal that the district court erred in adopting that procedure.[4]

[3] Even then, only Olano, proceeding pro se, raised the issue, and he did so by arguing that permitting the alternates to retire with the jury violated his "right" to a jury of exactly 12 members—a "right" that this Court has held not to exist. See *Williams* v. *Florida*, 399 U.S. 78 (1970). The court of appeals found that argument sufficient to raise the Rule 24(c) violation, found that violation to be plain error, and extended that holding to respondent Gray—who was represented by counsel, but did not properly raise the argument even on appeal—because in the court's view it would be a "manifest injustice" not to do so. Pet. App. 30a.

C. The District Court's Failure To Discharge The Alternate Jurors At The Time Of Jury Deliberations Was Not Plain Error

Although treating the case as one in which respondents failed to preserve their claim in the district court, the court of appeals nonetheless reversed respondents' convictions by holding that the Rule 24(c) violation constituted "plain error." That holding, we submit, reflects a serious misapplication of the plain error rule.

Under Rule 52(b), Federal Rules of Criminal Procedure, an appellate court may take cognizance of "plain errors or defects affecting substantial rights" even in the absence of an objection. The rule is a narrow exception to the contemporaneous objection rule, an exception that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*,

[4] Every court of appeals has recognized that principle, holding that, except perhaps in the most exceptional circumstances, a defendant should not be able to win reversal of his conviction based on a trial error that he invited. See, *e.g.*, *United States* v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); *People of the Territory of Guam* v. *Alvarez*, 763 F.2d 1036, 1038 (9th Cir. 1985); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982); *United States* v. *White*, 377 F.2d 908, 911 (4th Cir.) (a defendant "may not effectively complain that his own trial strategy denied him his constitutional rights"), cert. denied, 389 U.S. 884 (1967).

456 U.S. 152, 163 n.14 (1982). It should be invoked "to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). To satisfy that standard, a reviewing court must "find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact" on the trial. *Id.* at 17 n.14. The violation of Rule 24(c) in this case did not approach the level of plain error.

Neither the court of appeals nor the respondents were able to point to any specific prejudice that respondents suffered as a result of the alternates' presence in the jury room during deliberations. Instead, the court based its plain error ruling on the conclusion that permitting alternates to retire with the jury is "inherently prejudicial," Pet. App. 28a, and that it requires reversal in every case, regardless of whether any specific prejudice flowed from the error, *id.* at 29a-30a.

The court of appeals' reliance on the "inherent prejudice" rationale to find plain error is wrong in two respects. First, it is contrary to this Court's admonition that "[a] *per se* approach to plain-error review is flawed." *United States* v. *Young*, 470 U.S. at 17 n.14. Second, the error in this case was not, in any event, "inherently prejudicial."

1. As this Court has emphasized, it is not enough to find that an error has been committed; in order for a reviewing court to find plain error, it must find that the error adversely affected the defendant in a substantial way.[5] The reviewing court must find that

[5] Although the language of Rule 52(b) is somewhat opaque on this point, the Court has made clear that an error does not constitute "plain error" simply because it is obvious. It must also result in substantial prejudice to the defendant—enough to give rise to a miscarriage of justice. See *United States* v. *Frady*, 456 U.S. at 163-164 & n.14; *Peretz* v. *United States*, 111 S. Ct. at 2678 (Scalia, J., dissenting).

the error "had an unfair prejudicial impact on the jury's deliberations," which means that the error must have "undermined the fairness of the trial and contributed to a miscarriage of justice." *United States* v. *Young*, 470 U.S. at 17 n.14.

The court of appeals' invocation of the concept of "inherent prejudice" reflects confusion about the distinction between plain error and harmless error, see Fed. R. Crim. P. 52(a). In conducting harmless error analysis, the courts have identified certain errors as "inherently prejudicial" and therefore not subject to being disregarded as harmless even in the absence of a showing of specific prejudice. This Court has included in that category "structural defects in the constitution of the trial mechanism," *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991), as well as other errors whose impact on the trial cannot easily be assessed.[6] The Court's determination that a par-

[6] Those errors include denial of the right to an impartial adjudicator, *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion); trial by a prosecutor with a financial interest in the outcome, *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion); denial of the right to conflict-free counsel at trial, *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978); denial of the right to self-representation, *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984); denial of the right to a public trial, *Waller* v. *Georgia*, 467 U.S. 39, 49 & n.9 (1984); denial of the right to have a judge conduct jury selection, *Gomez* v. *United States*, 490 U.S. 858, 876 (1989); and denial of the right not to be forced, without sufficient justification, to take antipsychotic medication during trial, *Riggins* v. *Nevada*, 112 S. Ct. 1810, 1816 (1992).

ticular error can never be harmless within the meaning of Rule 52(a) does not, however, mean that such an error is always "plain" within the meaning of Rule 52(b).

The doctrines of harmless error and plain error protect different interests. The harmless error rule protects rulings in criminal cases from attack on inconsequential grounds. The plain error rule has the dual function of protecting the process of adjudication at trial by requiring the defendant to make his wishes known with respect to a particular ruling, and at the same time protecting against the risk that a defendant will be unjustly convicted because of a serious default on the part of his attorney.

Because of the different policies served by the two doctrines, an error that is non-harmless is not necessarily "plain." An error will be found harmless only if a reviewing court has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict, since the concern for the fairness of the proceedings must be balanced against the strong policy interests requiring a claim of error to be brought to the attention of the district court in time for the error to be avoided or corrected.[7]

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[7] The courts of appeals that have addressed the relationship between the harmless error and plain error standards have noted that a finding of plain error ordinarily requires a greater showing of prejudice than is necessary to avoid a finding of harmless error. See *United States* v. *McKinney*, 954 F.2d 471, 475-476 (7th Cir. 1992) ("Plain error * * * is an error so grievous that it caused an actual miscarriage of justice, which implies that the defendant probably would not have been convicted absent the error."); *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985). That is particularly so with respect to constitutional errors, which cannot be excused under the harmless error doctrine unless the errors are harmless beyond a reasonable doubt.

This Court's cases illustrate the different status of claims of "inherent prejudice" under the harmless error and plain error rules. For example, the Court has held that a denial of the right to a public trial is not subject to harmless error analysis: "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984). Yet the Court has held that a defendant who does not object to closure of the proceedings may forfeit his right to a public trial, at least where the showing of specific prejudice is not "sufficiently impressive to render irrelevant failure to make a timely objection." *Levine* v. *United States*, 362 U.S. 610, 619 (1960). The Court in *Levine* noted, in words that are fully applicable to this case, 362 U.S. at 619-620: "Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."

Similarly, the Court has held that a claim of racial discrimination in the selection of the grand jury can never be harmless error. See *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986). Nonetheless, such a claim is forfeited if it is not timely raised in the district court. See *Davis* v. *United States*, 411 U.S. 233 (1973). Although the *Davis* case itself dealt with a

collateral attack on a conviction under 28 U.S.C. 2255, the principle for which it stands is equally applicable to the plain error doctrine. As the Court explained, "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." 411 U.S. at 245.

The same principle applies to other rights, such as the right of self-representation. The denial of that right, the Court has held, is per se reversible error; that is, an erroneous denial of the right is not subject to harmless error analysis. *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984). But there is no requirement that a court invite a defendant to represent himself or even advise him that he has that right, and if the defendant does not timely and unequivocally invoke the right to represent himself, he forfeits it. See *United States* v. *Martinez*, 883 F.2d 750, 757-758 (9th Cir. 1989) (citing cases); *United States* v. *Gillis*, 773 F.2d 549, 559 (4th Cir. 1985); *United States* v. *Weisz*, 718 F.2d 413, 425 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *Brown* v. *Wainwright*, 665 F.2d 607, 610-611 (5th Cir. 1982) (en banc); see generally *McKaskle* v. *Wiggins*, 465 U.S. at 183.

2. Even if "inherent prejudice" were enough to give rise to plain error, it would not help respondents, because the error at issue in this case was not, in any event, "inherently prejudicial." For several reasons, permitting alternate jurors to be present in the jury room during deliberations is simply not the kind of irregularity that should justify reversal in the absence of a substantial showing of specific prejudice to the defendant's right to a fair trial.

First, even assuming that the alternate jurors violated their instructions not to participate in the deliberations, there is as much reason to assume the alternate jurors favored acquittal as there is to think they favored conviction. An error that is at least as likely to benefit as to harm a defendant cannot fairly be regarded as inherently prejudicial. Indeed, in the present context the error was *more* likely to benefit respondents; as this Court has indicated, it is widely supposed that a larger jury favors the defense because the difficulty of achieving a unanimous verdict of guilt beyond a reasonable doubt increases as the number of jurors does. See *Ballew* v. *Georgia*, 435 U.S. 223, 234 (1978) (plurality opinion) ("Statistical studies suggest that the risk of convicting an innocent person * * * rises as the size of the jury diminishes.").

Second, the presence of alternate jurors during deliberations did not violate any constitutional right of respondents. In concluding that the violation of Rule 24(c) amounted to plain error, the court of appeals relied on the Fourth Circuit's decision in *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (1964), which itself rested on the view that the " 'trial by jury' contemplated by Article III, Section 2, [Cl. 3] and the Sixth Amendment is a trial by a jury of twelve persons, *neither more nor less.*" 335 F.2d at 870. See also *id.* at 871 ("Twelve is the magic number."). That constitutional premise of the Fourth Circuit's decision in *Virginia Erection Corp.*, however, was disapproved in *Williams* v. *Florida*, 399 U.S. 78 (1970). There, the Court rejected the contention that the constitutional guarantee of a trial by jury requires a trial by exactly 12 persons, holding that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unneces-

sary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" *Id.* at 102 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). This Court has never suggested that the Constitution imposes a limit on the maximum size of juries, and respondents point to no reason that trial by *more* than 12 jurors implicates their constitutional rights.[8]

Third, the court of appeals erred in concluding that the presence of alternate jurors during deliberations is inherently prejudicial because it "infringes upon the jury's privacy and the secrecy of the jury process." Pet. App. 28a (citing *Virginia Erection Corp.*, 335 F.2d at 872). To be sure, if the sanctity of the jury room and the privacy of deliberations is not protected, there is a danger that "[f]reedom of debate might be stifled and independence of thought [might be] checked." *Clark* v. *United States*, 289 U.S. 1, 13 (1933). That danger, however, is not presented by the presence—or even the active participation—of alternate jurors during deliberations.

It is true, of course, that the alternates were not technically members of the jury, because "[o]nce [deliberations] commenced, 'the jury' consisted only

[8] The Court recognized in *Williams* that the number of jurors "should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100. In the wake of *Williams*, the Court focused on the *minimum* number of jurors that could constitutionally be employed. See *Johnson* v. *Louisiana*, 406 U.S. 356 (1972) (9-3 verdict constitutional); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (10-2 verdict constitutional); *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (5-1 verdict unconstitutional); *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (5-0 verdict unconstitutional).

of the prescribed number of jurors," *United States* v. *Beasley*, 464 F.2d 468, 469 (10th Cir. 1972). It defies reality, however, to suggest that the presence of the alternate jurors in the jury room during deliberations fundamentally altered the jury's deliberative process. In virtually every respect, alternate jurors are "indistinguishable from regular jurors." *Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), cert. denied, 454 U.S. 867 (1981). They are subject to the same selection process as regular jurors, have the same qualifications, take the same oath, and "have the same functions, powers, facilities and privileges." Fed. R. Crim. P. 24(c). They hear the same evidence, the same arguments of counsel, and the same instructions from the court. Like regular jurors, alternates have been subjected to *voir dire* and determined to be impartial. Accordingly, "the alternate who accompanies the regular jurors into deliberations has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror." *Johnson* v. *Duckworth*, 650 F.2d at 125.[9]

The distinction between regular jurors and alternates was reduced even further in this case by the procedure used to select the alternates. The alternates were not chosen until the end of the trial, at which time two of the 14 jurors were designated as alternates. Until that time, the jurors did not know

[9] The only conceivable difference between alternates and regular jurors is that alternates are "not committed to the decision that [is] ultimately reached, [and are] not faced with the awful responsibility to decide." *State* v. *Cuzick*, 530 P.2d 288, 289-290 (Wash. 1975). It is hard to imagine, however, that because of that difference the presence of two alternates in the jury room could affect the course and substance of the jury's deliberations.

which of them would be the 12 regular jurors and which would be the two alternates. It is therefore quite unrealistic to treat the alternates, who had in effect served as regular jurors during the three months of the trial, as "strangers" to the jury room whose presence constituted a threat to the sanctity of the jury's deliberations.

The court of appeals thought that the mere presence of alternate jurors during deliberations was inherently prejudicial, in part because their "attitude[s], conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." Pet. App. 28a. The court of appeals erred in thinking that this potential imposition on the jury process was a basis for finding plain error.

The court of appeals offered no reason to refute the common sense proposition that the "body language" of the alternates could not have had any effect on the deliberations. Any juror who favors acquittal and is resolute enough to resist the facial expressions and gestures of the regular jurors who disagree with him—not to mention their attempts at oral persuasion—would not be swayed in favor of conviction by the expressions or gestures of an alternate. Moreover, the district court specifically instructed the entire jury that the alternates were not to participate in deliberations, making clear that anything said or done by the alternates should not be considered in reaching a verdict. Just as the alternates are presumed to have followed the instruction not to participate, the regular jurors should be presumed not to have allowed themselves to be influenced by any actions of the alternates. It is fanciful to assume that jurors—who the criminal justice system routinely expects to disregard such potentially powerful influences as improper prosecu-

torial comment, improperly admitted evidence, information about other crimes, or the defendant's criminal record—cannot disregard the "body language" of alternate jurors.[10]

The relative insignificance of the Rule 24(c) error at trial is perhaps most pointedly underscored by the fact that defense counsel consented to allowing the alternates to sit in on the deliberations. It is highly unlikely that defense counsel, after observing the jurors for three months and being in the best position to assess any possible effect that retaining the alternates might have on the verdict, would give their considered consent to a procedure that violated their clients' substantial rights to the point of producing a miscarriage of justice. To the contrary, counsel's consent indicates that the defense either favored the procedure employed at trial—perhaps concluding that at least one of the alternates might favor acquittal—or did not regard the matter to be of sufficient moment to warrant an objection. There is no reason to permit respondents to question that choice now.

Not only did the court of appeals overstate the significance of the error in this case, but it failed altogether to take into account the costs exacted by the reversal of a conviction based on a finding of plain error. One of the considerations underlying the courts' reluctance to find plain error absent a

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[10] This Court has applied "in many varying contexts" the "almost invariable presumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (citing *Francis* v. *Franklin*, 471 U.S. 307, 325 n.9 (1985)). The court of appeals did not dispute that this principle is applicable here, but rather thought that the danger of silent influence was so inherently prejudicial to respondents that it was irrelevant whether the jury disregarded the instruction that the alternates were not to participate in deliberations.

grave risk of injustice is "the societal costs of reversing [the] conviction and requiring a retrial." *United States* v. *Young*, 470 U.S. at 22 n.1 (Brennan, J., concurring in part and dissenting in part). The costs of a reversal in this case are huge: a reversal would effectively nullify the investment of three months of trial time by the court, court personnel, the jury, witnesses, and counsel. It also would make an accurate verdict much less likely, now that more than five years have passed since the trial and more than eight years since the underlying events took place. Besides the burden and expense of a retrial, the problems of fading memories, lost witnesses, and changing government personnel would make a retrial both difficult to conduct and less likely to result in a just disposition of the charges. For that reason as well, the court of appeals should not have reversed respondents' convictions without being confident that the Rule 24(c) violation resulted in particular and substantial prejudice to respondents' right to a fair trial.

D. Respondents' Personal Consent Was Not Necessary For A Valid Forfeiture Of Their Rule 24(c) Claim

In addition to ruling that it was inherently prejudicial to permit the alternates to retire with jury, the court of appeals concluded that the defendants' consent to the procedure through counsel was not sufficient to hold respondents to the consequences of their choice. In order to forfeit their Rule 24(c) claim, the court of appeals held, respondents would have had to give their personal consent to the procedure. Pet. App. 26a. There is no sound basis for that holding.

This Court has recognized that, as a constitutional matter, "the accused has the ultimate authority to make certain fundamental decisions regarding the

case," such as whether to be represented by counsel, whether to plead guilty, and whether to waive a jury. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainwright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring). Nonetheless, the constitutional requirement of personal, informed consent by the defendant as a precondition to the effective waiver of trial rights is very much the exception rather than the rule, and the exceptions all involve decisions that have sweeping implications for the litigation.

With respect to most trial rights, the defendant's attorney is authorized to make tactical decisions that can result in the valid forfeiture of those rights without the need to obtain a record recital of the defendant's personal and informed consent. As this Court has explained:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.

Taylor v. *Illinois*, 484 U.S. 400, 417-418 (1988) (footnote omitted). "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); see also *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Faretta* v. *California*, 422 U.S. 806, 820 (1975) ("when a defendant chooses to have a lawyer manage and present his

case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas"). A contrary rule would make trials impossibly cumbersome and lace them with the possibility of reversible error at every turn.

The decision to permit alternate jurors to retire with the regular jurors during deliberations is not the sort of "fundamental" trial decision that the defendant must make personally. Decisions such as whether to be represented by counsel, to plead guilty, or to waive a jury trial profoundly affect the structure of the proceedings; in that respect they are fundamentally different from the decision whether to consent to the presence of alternate jurors in the jury room during deliberations.

There is nothing to distinguish the decision to permit alternate jurors to observe the jury's deliberations from myriad trial decisions that defense counsel make every day without any on-the-record expression of personal consent by the defendant. For example, counsel may decide, as a tactical matter, not to cross-examine a key witness against the defendant, or even to refrain from cross-examining any of the government's witnesses. There is no requirement that the defendant be consulted about that decision, let alone that he personally consent to it on the record. See *Taylor* v. *United States*, 484 U.S. at 418. Similarly, counsel may bind the defendant by deciding not to seek suppression of physical evidence that may be the government's only evidence; there is no requirement that the defendant give an informed, on-the-record consent to that decision. Those choices, like scores of others, may be made—and possible claims on appeal therefore forfeited—without any involvement of the defendant, even though they are likely to have far more impact on the proceedings

than the decision to let alternate jurors silently observe jury deliberations. Indeed, unless a defendant can show plain error or constitutionally ineffective assistance of counsel, a defendant will be held to his lawyer's failure to object even if that failure was inadvertent. See generally *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The court of appeals justified its conclusion by pointing to the interests served by requiring the personal consent of the defendant. Requiring a personal waiver, the court said, "alerts the defendant to the fact that a waiver of Rule 24(c)'s protections may affect the outcome of his case." Pet. App. 26a. We doubt the validity of that proposition. Even if it were correct, however, the same is true of countless other decisions at trial that are undoubtedly subject to waiver by counsel, and the court of appeals offered nothing to distinguish Rule 24(c) from those run of the mine decisions. The court of appeals did not suggest that a right of constitutional dimension was at stake (presumably because none was), and it did not attempt to reconcile its holding with this Court's teaching that only the most fundamental decisions require a personal waiver by the defendant. The court of appeals therefore erred in holding that to allow the alternates to retire with the jury was per se reversible error that could be waived only by the informed, personal consent of each defendant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

JOEL GERSHOWITZ
Attorney

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In The

Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

v.

GUY W. OLANO, JR., and RAYMOND M. GRAY,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT RAYMOND M. GRAY

SHERYL GORDON MC CLOUD
1111 Third Avenue
Suite 1060
Seattle, Washington 98101
(206) 224-8777

WILLIAM J. GENEGO*
100 Wilshire Boulevard
Suite 1000
Santa Monica, California
90401
(310) 394-5802

Counsel for Respondent Raymond M. Gray.

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION AND SUMMARY OF ARGUMENT

Since the beginning of the system of trial by jury as we know it, the rule has always been that the deliberations of the persons charged with the responsibility of determining a defendant's fate are private and secret. As Judge Irving Kaufman explained the rule:

> The American jury system, Alexis DeTocqueville observed, is 'as direct and as extreme a consequence of the sovereignty of the people a universal suffrage.' Accordingly, the sanctity of the jury room is among the basic tenets of our system of justice.

Attridge v. Cencorp Division, 836 F.2d 113, 113-114 (2d Cir. 1987).

That rule was violated in this case. The violation was neither minor nor technical. A person who was not a juror, and was not responsible for deciding the case, remained with the deliberating jurors throughout the period of their deliberations, from the moment they started, until the time they reached a decision some four days later. That the unauthorized person was an alternate juror does not render the person any less an interloper or the violation of the rule any less significant. If anything, the person's status as an alternate juror, as one prepared to step in at any moment (according to the district court's instructions), and as one who been an equal with the jurors for three months of trial, only increases significantly the probability that the unauthorized person had an effect upon the deliberations.

The Court of Appeals correctly determined that there was an error in this case, and the Court of Appeals also

correctly concluded that given the specific nature of the error which occurred, there was a reasonable probability that the error was prejudicial. Pet. App. 24a, 29a. Based on its conclusion that the specific nature of the Rule 24(c) error made it inherently prejudicial and that it affected a substantial right of the respondents, the Court of Appeals exercised its authority under Fed. R. Crim. P. 52(b) to recognize the error in the absence of a contemporaneous objection. Pet. App. 29a-30a & n.23.

As to respondent Gray, it was not necessary for the Court of Appeals to act pursuant to the plain error doctrine of Rule 52(b) because Gray's counsel objected to the error. Assuming that the objection was insufficient, however, and that Respondent Gray's claim must be reviewed under Rule 52(b), the Court of Appeals' ruling was still correct. The Court found plain error because the nature of the error made it presumptively prejudicial, that decision is in accordance with this Court's prior decisions concerning the application of the plain error doctrine of Rule 52(b).

Petitioner argues that the defect in the Court of Appeals' opinion is that it adopts a *"per se"* approach to plain error. Under Rule 52(b) and creates a rule of automatic reversal to Rule 24(c) violations. *See* Petitioner's Brief 16-17 (hereafter "Pet. Brf.") this characterization of the Court of Appeals' is not accurate.

Petitioner's analysis of the opinion is flawed because it assumes that since the Court of Appeals did not make a finding of "actual prejudice," the Court therefore adopted a *"per se"* approach to plain error. Pet. Brf. 17-19. While it is correct that the Court of Appeals did not make a

finding of "actual prejudice," the absence of such a finding does not mean the Court of Appeals followed a *per se* approach to plain error in all cases. To the contrary, that Court determined that the particular error which occurred in this case was inherently and presumptively prejudicial, not that every other Rule 24(c) violation would be plain error in every case.

Moreover, the petitioner errs in claiming that inherently prejudicial errors never qualify for plain error review. An error which is inherently prejudicial can qualify as plain error under Rule 52(b), as the Court of Appeals determined here. Finally, even if the Ninth Circuit's determination that the error here was inherently prejudicial is insufficient to sustain the plain error ruling, the government should bear the burden of proving beyond a reasonable doubt, that the acknowledged prejudicial error was harmless.

The petitioner's position is flawed on policy grounds as well. Given the nature of the error which occurred here, a finding of actual prejudice or specific prejudice, which the petitioner argues is necessary, is not possible. The most that anyone can honestly say about the error is limited to its probable or likely effect. Under the petitioner's view, this means errors which are inherently prejudicial can never under any circumstances be recognized as plain error, because the finding of specific prejudice which the petitioner says is required can never be made. Hence, in advocating this position, petitioner creates exactly what it says is inappropriate – a *per se* approach to plain error (albeit, one which means that the

error is *per se* never plain error). Moreover, the petitioner's approach would have the illogical result of assuring that some of the most serious errors, "inherently prejudicial" errors, could never be corrected without a contemporaneous objection, while less serious errors could be so corrected. Similarly, if the petitioner's position were adopted, its effect would be to insure yet another round to litigation – a defendant whose trial counsel did not object to an inherently prejudicial error, and who because of that failure to object is not able to obtain relief through the plain error doctrine on direct appeal, has an airtight ineffective assistance of counsel claim. The only way to avoid such a result is to recognize, as the Court of Appeals did here, that some inherently prejudicial errors can be recognized and corrected on direct appeal as plain error.

ARGUMENT

I.

RESPONDENT GRAY OBJECTED TO THE RULE 24(c) VIOLATION AND HIS CONVICTION SHOULD BE REVERSED WITHOUT RELIANCE ON PLAIN ERROR

On May 26 the district court first suggested the idea that "the alternates go in but not participate, but just . . . sit in on [the jury] deliberations." J.A. 79, Tr. 10,399. In making the suggestion, the court stated "if there is even one person who doesn't like it we won't do it, . . . " *Ibid.* On May 27 the district court again raised the suggestion and respondent Gray's attorney stated unequivocally that he did not want the alternates to be

allowed to sit in on the deliberations. J.A. 82, Tr. 10,609 ("We would ask they not.") The following day, May 28, the district court inexplicably expressed its understanding that the lawyers had agreed to allow the alternates to deliberate:

> "Do I understand that the defendants now – its hard to keep up with you Counsel . . . You do all agree that all fourteen deliberate? Okay. Do you want me to instruct the two alternates not to participate in the deliberations?"

The only response was from counsel for co-defendant Hilling:

> That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations. J.A. 86, Tr. 10,736.

Thus, the only time that respondent Gray's counsel spoke on the court's suggested procedure, he clearly asked that the alternates *not* be allowed to go into the jury room during the deliberations. Respondent Gray's counsel objected to the Rule 24(c) error.

It is true that when the question was raised again the following day, Gray's counsel did not object a second time. Nor did he restate his position opposing the procedure. His silence, however, does not waive his earlier objection since he clearly stated the action he thought the district judge should take the first time. *See United States v. Pirovolos,* 844 F.2d 415, 424, n.8 (7th Cir. 1988); *United States v. Morgan,* 581 F.2d 933, 939, n.16 (D.C. Cir. 1978). This is particularly true given the district court's initial

representation that if even one person objected, the procedure would not be followed. Even though Gray's counsel had made his objection to the procedure obvious, the court continued to go forward with the procedure that it, alone, suggested.

This conclusion – that counsel's silence the second time, after making his position known the first time, did not waive his objection – is further supported by the ambiguous nature of the record. Although the court stated "[y]ou do all agree that all fourteen deliberate?", it is not only unclear whom the court was addressing, but the court's statement was incorrect – no one agreed that "all fourteen deliberate." At a minimum, given the deviation from the explicit command of Fed. R. Crim. P. 24(c) that the court was contemplating, and given that Gray's counsel had previously stated his objection to the deviation, the court should have specifically inquired whether Gray's counsel was withdrawing his previous objection.

Since respondent Gary objected to the Rule 24(c) error, his claim should be reviewed under the harmless error standard of Fed. R. Crim. P. 52(a) rather than the plain error standard of Rule 52(b). *See United States v. Morgan*, 581 F.2d at 939, n.16. Because the error which occurred was inherently prejudicial (*See* section II.A.3., *post*), respondent Gray is entitled to a reversal because an inherently prejudicial error cannot be harmless.[1]

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[1] Even if this Court were to determine that the Rule 24(c) error which occurred here was not inherently prejudicial, the burden would then be on the government to demonstrate that the error was harmless. Moreover, since the error which occurred here was of constitutional magnitude, the government would have to prove the error was harmless beyond a reasonable doubt. *See Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (potential influence on deliberating jurors by bailiff denied defendant his constitutional right to be an impartial jury); *Chapman v. California*, 386 U.S. 18, 24 (1967) (constitutional error requires reversal unless prosecution can demonstrate that the error was harmless beyond a reasonable doubt). *See* Section II.B.3., *post*. As discussed below, the government cannot meet that burden in this case. *Id.*

See United States v. Gomez, 490 U.S. 858, 876 (1989) (magistrate jury selection is inherently prejudicial and cannot be harmless error).

II.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE RULE 24(c) VIOLATION THAT OCCURRED IN THIS CASE WAS SUBJECT TO REVIEW AS "PLAIN ERROR" UNDER RULE 52(b)

Petitioner acknowledges that even with full and personal consent of everyone involved, the failure to discharge the alternate jurors once the deliberations began was error, as it violated the mandatory provision of Rule 24(c). Pet. Brf. 10. The Rule 24(c) violation which occurred here, however, is much more serious – the district court not only failed to discharge the alternates, but the alternates were present in the jury room during deliberations. While one of the two alternates left during the deliberations, the other alternate remained until the conclusion of the deliberations.

The Court of Appeals concluded that the error amounted to plain error under Rule 52(b). The petitioner's quarrel with that conclusion is two fold. First, petitioner asserts that the finding that an error is inherently prejudicial does not bring the error within rule 52(b) because it constitutes a *per se* approach to plain error. Second, even if it is true that an inherently prejudicial error can, on that basis, constitute plain error within the scope of Rule 52(b), the error which occurred here was not inherently prejudicial. Petitioner is wrong on both counts.

A. The Court of Appeals Correctly Concluded That The Specific Type Of Rule 24(c) Error Which Occurred In This Case Was Inherently And Presumptively Prejudicial

1. The Types of Rule 24(c) Error

In determining whether the Court of Appeals' decision that the Rule 24(c) error in this case was inherently prejudicial was based on an impermissible *per se* approach to plain error, it is necessary to understand the types of Rule 24(c) error that have been recognized. A Rule 24(c) error may take a variety of different forms. First, it is error if the alternate jurors are not discharged even if they are kept apart from the regular jurors during deliberations. *See, e.g., United States v. Rubio,* 727 F.2d 786, 799 (9th Cir. 1983). Second, it is error to substitute an alternate juror (who has not been discharged but not allowed to deliberate) for a regular juror after deliberations have commenced. *See, e.g., United States v. Kaminski,* 692 F.2d 505, 518 (8th Cir. 1982); *Leser v. United States,* 358

F.2d 313, 317 (9th Cir.), *petition for cert. dismissed* 385 U.S. 802 (1966). Third, it is error if the alternate is not discharged and instead made into a regular juror when deliberations commence, thereby effectively increasing the size of the jury. *See, e.g., United States v. Reed,* 790 F.2d 208, 210 (2d Cir.) *cert. denied* 479 U.S. 954 (1986). Fourth, the trial court may err by failing to discharge an alternate juror and allowing the alternate to be present during the deliberations of the regular jurors, even though the alternate is not charged with responsibility for deciding the case. *See, e.g., United States v. Beasley,* 464 F.2d at 469. In the present case, it was the fourth type of error which occurred; the alternate jurors were not discharged and were then allowed to be present during the deliberations of the regular jurors.

2. The Nature Of The Prejudice

The type of Rule 24(c) error which occurred in this case is different from and more serious than, the other types of Rule 24(c) errors because of its potential for prejudice. That prejudice is any effect on the deliberations of the jurors caused by the presence of the unauthorized persons. Such an effect has universally been recognized to constitute prejudice, and given our system of trial by jury, a more serious type of prejudice can hardly be imagined. *See Parker v. Gladden,* 385 U.S. at 364-365; *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965). The prejudice is also the lack of secrecy and the breach of the jealously guarded sanctity of juror deliberations. *See United States v. Watson,* 669 F.2d 1374, 1390-91 (11th Cir. 1982); *United States*

v. Phillips, 664 F.2d 971, 995 (5th Cir. 1981) (discussing *United States v. Lamb*, 529 F.2d 1153, 1160 (9th Cir. 1975) (*en banc*) (Wright, J. dissenting).

Petitioner impliedly assumes, without citing support, that prejudice in the context of the present case means that the presence of the alternate jurors "fundamentally altered the jury's deliberative process." Pet. Brf. at 23. Using that as the standard, petitioner asserts that the alternates could not have had this effect, especially since they sat through the trial and heard the evidence. Indeed, petitioner suggests that there was hardly error at all, noting that the "alternates were not technically members of the jury" but were very much like the jurors. Pet. Brf. at 22-23.

The petitioner has misperceived both the error and the prejudice. The problem here is that *no one* is allowed inside the jury room during deliberations under any circumstances except the persons who have responsibility for deciding the case. *See, e.g., United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978); *cf. United States v. Pittman*, 449 F.2d 1284, 1286 (9th Cir. 1971). There are no degrees of membership in a jury; to call the difference "technical" under any circumstances is to miss the point entirely. Judges, lawyers and litigants do not spend countless hours to determine who will "technically" be a member of the jury. The parties are entitled to have the case decided by the individuals chosen and designated for that purpose. As noted above, the prejudice is that the jury's deliberations may have been influenced by an improper source, a person not authorized to be in the jury room, and a person not responsible for deciding the case.

See Parker v. Gladden, 385 U.S. at 364-365; *Turner v. Louisiana*, 379 U.S. at 472; *see also United States v. Essex*, 734 F.2d 832, 845 (D.C. Cir. 1984). Influence, not outcome, is the prejudice. *Parker v. Gladden*, 385 U.S. at 365. Lack of secrecy is the prejudice. *State v. Cuzick*, 85 Wash. 2d 146, 149, 536 P.2d 288 (1975). Although it is admittedly not possible on the present record to know whether the unauthorized persons had such an effect, it is difficult to believe that a person could remain inside a room with twelve other people for up to four days, who are discussing what they had all spent the last three months of their lives hearing about together, and have no effect.

3. The Type Of Rule 24(c) Error Which Occurred In This Case Was Presumptively And Inherently Prejudicial

The Court of Appeals, in concluding that the error was subject to review as plain error under Rule 52(b), ruled that the error was inherently or presumptively prejudicial because of the particular features of the type of Rule 24(c) error which occurred here: "We conclude that permitting unauthorized persons *to be present in the jury room while the jury is deliberating*, in violation of Rule 24(c), is inherently prejudicial." Pet. App. 28a (emphasis added). Thus, contrary to the assertion of petitioner, the Court of Appeals did not rule that a violation of Rule 24(c) is always inherently prejudicial or automatic reversible error.

Rather, the Court of Appeals carefully delineated the numerous ways in which the presence of unauthorized persons in the jury room, including alternate jurors, can affect the deliberations. Pet. App. 28a-29a. The attitude of the unauthorized persons, their facial expressions and their body language could all influence the deliberations. Common human experience suggests that being observed silently by another can affect the process of deliberation and consultation. Even the decision to depart suddenly, as one of the two alternates did in this case, may have an effect on the deliberations. *See United States v. Lamb*, 529 F.2d at 1160 (Wright, J., dissenting) (citing *United States v. Beasley*, 464 F.2d at 470).

The likelihood and potential for prejudice in this case was increased by the manner in which the alternates were chosen and by the instructions they were given when told they could stay for the deliberations.

First, no alternates were chosen or designated until the jury was about to retire to deliberate. J.A. 20-23, 81 Tr. 17-21, 10,608. Throughout the three-month trial, the jurors who were ultimately designated as alternates were equal to the jurors who ultimately became the deliberating jury. This equality during the trial could only have increased the effect that the alternates would have upon the deliberating jurors, since it would foster a sense of equality during deliberations also.

Second, in telling both the regular jurors and the alternates that the alternates could stay for the deliberations, the trial judge explained: " . . . we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we

want you to be able to step in having heard the deliberations." J.A. 89-90, Tr. 10,802. Once again, this explanation could have only increased the potential that the alternate jurors would have an effect on the deliberations of the regular jurors, since everyone thought that the alternates could "step in" in any time.[2]

Third, the district court's instruction that the alternates should not participate in the deliberations was perfunctory and limited. The only instruction given to the regular jurors and the alternates about the role of the alternates was the following: "But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard. . . . " J.A. 89, Tr. 10,802. The jurors were not told to avoid facial expressions, body language or the like which would communicate their attitude or beliefs. In fact, the district court never defined what it meant "not to participate," other than to essentially suggest that a violation of this provision would be understandable. The strong, specific and unequivocal commands from the trial court that one would expect in such a circumstance are completely absent.

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[2] The district court's explanation was wrong – the alternate jurors could not have substituted for a regular juror as it is prohibited by Rule 23 and Rule 24. Pet. App. 24a *citing* Advisory Committee Notes to 1983 Amendment to Rule 23; C. Wright, *Federal Practice and Procedure*, § 388, at 393 & n.26 (2d. ed. 1982 & Supp. 1992).

Based on all of these factors, the Court of Appeals concluded that it was reasonably probable that the error which occurred here would result in prejudice (*i.e.*, that the deliberations of the jurors would be affected by the unauthorized person(s)):

> Given the difficulty of ascertaining the numerous, and often subtle, ways alternate jurors can impinge upon the privacy of the jury, given the potential that their presence may in fact affect the deliberating jurors' ultimate determination if they are allowed to be present, and given the emphatic adoption of the *Virginia Erection* principles by the Advisory Committee of the Federal Rules, we conclude that the district court's deviation from Rule 24(c) without the express, personal consent of the defendants was inherently prejudicial.

Pet. App. 29a.

As the Court of Appeals accurately and candidly acknowledged, the very nature of the error here precludes a finding of actual prejudice or specific prejudice. Pet. App. 24a, 28a. Once the error occurs and the jurors have been discharged, there is no practical way to make a determination of actual or specific prejudice. Indeed, the only way even to attempt to make a finding of specific or actual prejudice would be to violate the rule which prohibits examining jurors as to the process of deliberation and the factors influencing their decision. *See* F.R. Evid. 606(b); *McDonald v. Pless*, 238 U.S. 264 (1914); *Attridge v. Cencorp Division*, 836 F.2d at 113-114; *United States v. Brooks*, 677 F.2d 907, 913-914 (D.C. Cir. 1982) (per curiam); *United States v. Crosby*, 294 F.2d 928, 949 (2d Cir. 1961).

The Court has recognized that where it is impossible to determine the extent of prejudice caused by a particular error, but the nature of the error or the circumstances surrounding the commission of the error suggest that it is very likely to have had a prejudicial effect, the errors are appropriately recognized as "inherently" prejudicial or "presumptively" prejudicial.[3] That describes precisely the nature of the particular type of Rule 24(c) error which occurred in this case.

4. The Petitioner's Contentions As To Why The Error Could Not Have Had A Prejudicial Effect Lack Merit

Petitioner sets forth a number of points to argue that the error in this case could not have been prejudicial, much less inherently prejudicial. Pet. Brf. 20-25. For the most part, those points are based upon petitioner's misperception of the nature of the prejudice, as discussed above. Section II.A.2. When the prejudice presented by the Rule 24(c) error which occurred in this case is accurately identified (*i.e.*, influence, not outcome), petitioner's contentions fail. *See* pp. 9-11, *ante*. The other points raised by petitioner to suggest no prejudice could have occurred are also without merit.

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[3] *See, e.g., Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (counsel with conflict); *Davis v. Georgia*, 429 U.S. 122 (1976) (improper exclusion of prospective juror); *Vasquez v. Hillery*, 474 U.S. 254, 263-264 (1986) (racial discrimination in selection of grand jurors); *Turner v. Louisiana*, 379 U.S. at 472-473 (improper presence of deputy sheriffs with deliberating jurors).

Petitioner asserts that there could have been no prejudice because the unauthorized persons were just as likely to favor acquittal as conviction and that respondents could have only been helped by a larger jury. (Pet. Brf. 21). Respondents did not have a jury of thirteen or fourteen, they had a jury of twelve. The presence of anyone else destroys the jury's secrecy. Any effect that others had on the deliberations of those persons was improper. Moreover, even if it is true in the abstract that the unauthorized persons may have been just as likely to favor acquittal as conviction, given that respondents were convicted, it is fair to assume that the petitioner, not the respondents, benefitted from the violation of the rule.

Finally, petitioner's suggestion that there could be no prejudice because courts assume that jurors follow their instructions (Pet. Brf. 25, n.10) is inconsistent with case law and common sense reality. *See United States v. Chatman*, 584 F.2d at 1361; *United States v. Beasley*, 464 F.2d at 470. The suggestion is particularly unpersuasive in the present case, since the trial court instructions on the issue were cursory and did not explain what it was the alternates were not to do. *See* p. 13, *ante*.

5. The Court Of Appeals' Conclusion That The Type Of Rule 24(c) Error Which Occurred In This Case Was Presumptively Prejudicial Is Supported By Federal Decisions Addressing This Type Of Error And Innumerable State Court Decisions

Petitioner's suggestion that the potential prejudicial effect of the error which occurred here was minimal or non-existent not only reflects a failure to appreciate the

process of jury deliberations and the nature of prejudice, but it flies in the face of the collective experience and shared conclusions of dozens of trial and appellate court judges as well as the wisdom of the drafters of the Federal Criminal Rules.

In addressing Rule 24(c) errors, federal courts have tailored the remedy according to the particular violation. *See e.g., United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1983); *United States v. Kaminski*, 692 F.2d at 518; *Leser v. United States*, 358 F.2d at 317; *United States v. Reed*, 790 F.2d at 210. Where Rule 24(c) is violated by permitting the alternates to attend the deliberations, federal courts recognize that the likelihood of prejudice is great. *See, e.g., United States v. Chatman*, 584 F.2d at 1361; *United States v. Beasley*, 464 F.2d at 469.

State courts have also recognized the inherent prejudice in allowing alternates to attend jury deliberations. Many states have rules or statutes similar to Rule 24(c) requiring the discharge of alternate jurors prior to the commencement of deliberations.[4] In the majority of these states, a trial court's failure to adhere to this rule, where that failure includes permitting the alternates to attend the deliberations, requires reversal of a subsequent conviction. As the North Carolina Supreme Court has accurately observed:

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[4] *See, e.g.*, Ark. Code Ann. § 16-30-102(b); Colo. R. Crim. P. 24(c); Fla. Rule Crim. P. 3.280; N.C. G.S. § 9-18; Mass. R. Crim. P. 20(d)(2); N. Mex. R. Crim. P. 38(c); Tenn. Code Ann. § 22-222; Wash. Crim. P. R. 6.5.

> The rule formulated by the overwhelming majority of the decided cases is that the presence of an alternate, either during the entire period of deliberation preceding the verdict, *or* his presence at any time during the *deliberations* of the twelve regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate.

State v. Bindyke, 288 N.C. 608, 220 S.E. 521, 531 (N.C. 1975) (emphasis in the original) (citing cases). The authors of Federal Rule 24(c) were not drafting on a blank slate; rather, they codified the position firmly embraced by most jurisdictions.

The judicial reasoning supporting such a bright line rule have been varied. However different the reasons given by courts in support of the rule, each of the arguments now raised by the petitioner has been rejected by state as well as federal courts. Some state courts have, for example, squarely rejected the argument raised by petitioner here that an increase in the number of jurors is either harmless or constitutional. *See, e.g., Glenn v. State*, 217 Ga. 553, 123 S.E.2d 896 (1962); *Woods v. Commonwealth*, 287 Ky. 312, 152 S.W.2d 997 (1941); *State v. Rowe*, 30 N.C. 115, 226 S.E.2d 231, 232 (1976); *Commonwealth v. Krick*, 164 Pa. Super. 516, 67 A.2d 746 (1949).

Other courts have rooted their stringent enforcement of the rule against presence of alternates during jury deliberations not primarily on the number of participating jurors but rather upon concerns about protecting the

integrity, confidentiality, and sanctity of jury deliberations, weighty concerns that petitioner would have this Court deem wholly inapplicable. *See, e.g., State v. Cuzick*, 85 Wash.2d 146, 530 P.2d 288, 289 (1975) (reversing conviction despite failure to object); *Bindyke*, 220 S.E.2d at 553. Moreover, the petitioner's contention that "[i]t is unrealistic to characterize the alternate jurors as strangers to the jury" because of their prior participation in the trial (Pet. Brf. 9), has been squarely rejected by state courts. An alternate who is present during deliberations is not a juror, and has no solemn civic or moral duty to perform in the exercise of the jurors' expression of the conscience of the community. As the Massachusetts Supreme Judicial Court has held, when alternates "attend jury deliberations they do so as mere strangers." *Commonwealth v. Smith*, 403 Mass. 489, 531 N.E.2d 556, 559 (1988) (*citing State v. Cuzick, supra*). *Accord, Berry v. State*, 298 So.2d 491, 492 (Fla. App. 1974) ("the alternate is a stranger to the deliberations of the jury.") In short, an alternate is "essentially an outsider watching the other members of the panel reach their final decision." *Cuzick*, 530 P.2d at 289. As an outsider, the alternate breaches the secrecy and solemnity of the deliberative process upon which the jury system rests and depends.

Similarly, state courts have recognized that petitioner's suggestion that the presence of the alternates can be disregarded because they were instructed not to "participate" in the deliberations ignores that people effectively communicate with one another in many ways, including non-verbal expression such as gestures, facial expressions and body language. Alternates can participate through "facial expressions, gestures or the like,"

Berry v. State, 298 So.2d 491 (Fl. Ct. App. 1974), or "body language." *Smith*, 531 N.E.2d 556, 561 (Mass. 1988).

Moreover, even in the absence of any verbal or non-verbal communication between or among the jurors and alternate jurors, the mere presence of the alternate as an outside observer – especia'ly one uniquely familiar with evidence bearing upon the jurors' deliberative task and also familiar with the jurors themselves – may influence a juror. *Smith*, 531 N.E.2d at 561. As the Washington Supreme Court has stated, an alternate's "presence as one not obligated to express an opinion, not committed to the decision that was ultimately reached, not faced with the awesome responsibility to decide, could not have gone unnoticed by the twelve formally empaneled jurors and may well have affected their willingness to speak and act freely." *Cuzick*, 530 P.2d at 290.

For the foregoing reasons, most courts support the petitioner's position, as stated in its Brief, that Rule 24(c) "does not authorize the [trial] court to follow a different course [even] if the parties agree." Pet. Brf. 10. If the parties cannot affirmatively agree to a violation of the Rule, a failure to object to a Rule violation should not justify a contrary result.

B. The Court Of Appeals Was Correct In Holding That The Rule 24(c) Violation In This Case Was Plain Error

The purpose of Rule 52(b) is to provide a means to temper, in appropriate cases, the harshness of the traditional rule that an error to which no objection is made in

the trial court may not be recognized by the appellate court. *United States v. Young*, 470 U.S. 1, 15 (1985) ("The plain-error doctrine of Rule 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement.") *United States v. Frady*, 456 U.S. 152, 163 (1982). The ameliorative function of the plain error doctrine and its codification in Rule 52(b) has long been recognized and applied. *Wiborg v. United States*, 163 U.S. 632, 658 (1896) ("And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.") In contrast to this long and established history, the petitioner in this case reads Rule 52(b) as a rule of preclusion, hoping to use it as a source of authority for imposing the same limitations on direct appeal review of unobjected to errors that are currently applicable to collateral challenges of such errors. As discussed in Section I, this case does not present that issue, because respondent Gray's counsel objected to the Rule 24(c) violation. Further, it was not presented in the government's petition for certiorari, so it is not properly before the Court for that reason, either. If this Court does reach the issue of whether the Rule 24(c) violation here was inherently prejudicial, however, the answer is yes.

1. The Court Of Appeals Properly Applied The Plain Error Doctrine Of Rule 52(b) Because The Rule 24(c) Violation Was Inherently Prejudicial

There is no shortage of definitions of plain error. As one commentator has aptly observed, "[c]ourts have endeavored to put a gloss on the rule by defining the kind of error for which they reverse under Rule 52(b).

Thus, it is said that 'plain error' means 'error both obvious and substantial,' or 'serious and manifest errors,' or 'seriously prejudicial error,' or 'grave errors which seriously affect substantial rights of the accused.' Perhaps these attempts to define 'plain error' do not harm, but it is doubtful whether they are of much help." C. Wright, *Federal Practice and Procedure* § 856, at 336-337 (2d ed. 1982 & Supp. 1992) (footnotes and citations omitted); *compare, e.g., United States v. Frady*, 456 U.S. at 163 ("By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.") *with United States v. Young*, 470 U.S. at 16, n. 14 ("An error, of course, must be more than obvious or readily apparent in order to trigger appellate review under Rule of Criminal Procedure 52(b).")

Ever since *Brasfield v. United States*, 272 U.S. 448, 450 (1926), this Court has recognized that there are times when it is appropriate to apply the plain error doctrine on direct appear even though it is impossible to determine if the error caused specific or actual prejudice to the defendant. That principle is also supported by this Court's decision in *United States v. Atkinson*, 197 U.S. 157, 160 (1936), where the Court stated that a finding of plain error may be based on a finding that an error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Federal courts to the present time continue to recognize this basis for applying the plain error doctrine of Rule 52(b): the Circuit Courts of Appeals reverse convictions due to plain error for errors which are inherently prejudicial, even in the absence of a finding of

specific or actual prejudice. *See, e.g., United States v. Essex*, 734 F.2d 832, 845 (D.C. Cir. 1984); *Government of Virgin Islands v. Romain*, 600 F.2d 435, 437 (3d Cir. 1979); *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978).

The Court of Appeals' decision in this case is right in line with this precedent. The Court correctly found that the error was inherently prejudicial, that it affected a substantial right of the respondents, and concluded that it was appropriate to recognize the error under Rule 52(b). Pet. App. 28a-30a & n.23. Under the authority of *Brasfield* and *Atkinson*, and in accordance with the carefully reasoned opinion in *Essex*, the Court of Appeals' finding of plain error should be affirmed.

2. The Court of Appeals' Application Of Rule 52(b) Was Also Proper In This Case Because The Court Determined That The Rule 24(c) Error Had An Unfair Prejudicial Impact On The Jury's Deliberations

In seeking to reverse the Court of Appeals judgment, petitioner assumes that the opinion in *United States v. Young, supra*, silently overruled *Brasfield, Atkinson* and their progeny, and established a new rule that plain error can only be found where it is accompanied with a finding of specific or actual prejudice to the defendant. Pet. Brf. 17-19. *Young* does nothing of the kind. In fact, the opinion in *Young* quoted from *Atkinson* with approval: a finding of plain error is appropriate where the error " 'seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young*, 470 U.S. at 15

(quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

It is true that the Court in *Young* noted with approval that "federal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations." *United States v. Young*, 470 U.S. at 16, n.14. That observation does not constitute a holding which overrules prior authority. That is particularly true given the different types of error in *Young* and in this case. *Young* considered improper closing argument by a prosecutor, an error spread over the record, from which a finding of specific or actual prejudice is typically and easily made. The error in this case, in contrast, is within the category of inherently prejudicial errors, which elude a finding of specific or actual prejudice. The opinion in *Young* did not discuss or even consider the appropriate application of the plain error doctrine to such inherently prejudicial errors. *Young*, therefore, does not provide a basis for ruling that the application of the plain error doctrine to the present case was wrong.

Even assuming, however, that *Young* did establish a new universal rule for application of the plain error doctrine to all types of errors, the Court of Appeals' decision still comes within the criteria of *Young*. As noted above, *Young* stated that application of the plain error doctrine entails a finding that the error "had an unfair prejudicial impact on the jury's deliberations." *United States v. Young*, 470 U.S. at 16, n.14.

The Court of Appeals, after examining the specific features of the Rule 24(c) violation which occurred here, concluded that the error was inherently prejudicial and further determined that the nature of the error was such that it must have had an unfair prejudicial impact on the jury's deliberations. As demonstrated above, the court's conclusion that the Rule 24(c) violation which occurred here was presumptively prejudicial is well supported by the record. *See* pp. 11-14, *ante*. The Court of Appeals' application of Rule 52(b) thus fully satisfied the requirements articulated by *Young*.

Petitioner maintains that the Court of Appeals applied Rule 52(b) incorrectly for two reasons. First, petitioner suggests that a finding of "actual" prejudice is necessary for a finding of plain error and the Court of Appeals made no such finding here (Pet. Brf. 19-20) and, second, petitioner suggests that the Court of Appeals adopted a *per se* approach to plain error which *Young* said was inappropriate (Pet. Brf. 16-17). The criticisms miss their mark.

Neither this Court nor any other has ever said that a finding of "actual" prejudice is necessary before Rule 52(b) can be applied to an error. The only authority petitioner sets forth is support of this proposition is *Davis v. United States*, 411 U.S. 233 (1973), which petitioner admits is a decision on collateral attack of a conviction pursuant to 28 U.S.C. § 2255. *See* Pet. Brf. at 19-20. Petitioner nevertheless attempts to gain support from *Davis* by suggesting that the "principle for which it stands is equally applicable to the plain error doctrine." Pet. Brf. 20. This Court has, however, in unmistakable terms, ruled that different standards do and should apply between a

collateral challenge and plain error review. *United States v. Frady*, 456 U.S. at 164 ("By adopting the same standard of review for § 2255 Motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal.") There is no support for applying an actual prejudice standard to plain error review and, as *Frady* explains, it would be unwise for policy reasons to do so.[5]

Nor did the Court of Appeals adopt the *per se* approach to plain error that this Court in *Young* noted "was flawed." *United States v. Young*, 470 U.S. at 16, n.14. As this Court explained in making that statement, "[t]he Court of Appeals held that the prosecutor's improper remarks constituted 'plain error' *solely* because the prosecutor ignored that court's rule prohibiting such responses." *Ibid.* (emphasis added) Hence, the Court of Appeals approach to plain error in *Young* was flawed

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[5] At other points in its brief, petitioner suggests that something less than a finding of actual prejudice may be sufficient to constitute plain error. E.g., Pet. Brf. at 17-18. The only definitional content petitioner can provide to this concept is that it is something more than "non-harmless" error. *E.g.*, Pet. Brf. at 18 ("An error will be found harmless only if a reviewing court has great confidence that the error did not materially affect the verdict. In order to rise to the level of plain error, however, an error must have a more demonstrable effect on the verdict . . . ") Similarly, petitioner cites *Levine v. United States*, 362 U.S. 610, 619 (1960) for the proposition that the showing of prejudice "must be sufficiently impressive to render irrelevant failure to make a timely objection." Pet. Brf. 19. The Court of Appeals' decision meets that standard, as the Court examined the specific features of the Rule 24(c) error which occurred in this case to determine that it necessarily prejudiced the jury's deliberations.

because it did not consider the prejudicial impact of the error at all – it found plain error based on the mere fact that the rule was violated. That is not what the Court of Appeals did in this case. As explained above, the Court carefully examined and considered the specific features of the particular Rule 24(c) error which occurred in this case and, having done so, concluded that it had a prejudicial effect on the jury's deliberations. Pet. App. 28a-29a. While that finding was based on the conclusion that the particular error was inherently prejudicial, the fact remains that the Court of Appeals, in accordance with the requirements of *Young*, applied Rule 52(b) to the particular error in this case because it found that the error had a prejudicial effect.

Under the petitioner's suggested approach, an error which is inherently prejudicial can never amount to plain error. Since inherently prejudicial errors are errors which, by their very nature, are not capable of a finding of specific prejudice or actual prejudice, such errors could never meet the petitioner's test for plain error under Rule 52(b). Thus, some of the most serious errors in the criminal justice system, errors which by their very nature "seriously affect the fairness, integrity, or public reputation of judicial proceedings" (*United States v. Atkinson*, 297 U.S. at 160) could never be corrected on direct appeal through Rule 52(b) even though errors far less serious would still qualify.

This arrangement would be illogical and unfair. It is systemically undesirable because it encourages yet another round of litigation. The defendant whose attorney fails to object to an inherently prejudicial error at trial

(e.g., where the judge has a financial interest in the outcome, *see Tumey v. Ohio*, 273 U.S. 510 (1927), but who is then unable to obtain relief on direct appeal, will always be forced to seek relief through a collateral challenge on ineffective assistance of counsel grounds. While such a defendant will have a solid Sixth Amendment claim under *Strickland v. Washington*, 466 U.S. 668 (1984) (counsel should have objected and the defendant was prejudiced because he or she would have obtained an automatic reversal on appeal if counsel had objected), and the error will ultimately be corrected, such a circuitous means of remedying errors is not desirable from anyone's perspective. The only way to avoid such protracted litigation is to recognize that the Courts of Appeals, in appropriate cases, may find that an inherently prejudicial error is subject to correction on direct appeal pursuant to Rule 52(b) even though no objection was made to the error in the trial court. That is precisely what the Court of Appeals did in this case.

3. If This Court Determines That A Finding That An Error Was Inherently Prejudicial Is Insufficient For Plain Error Review Under Rule 52(b), The Case Should Be Remanded For A Determination Of Whether The Prosecution Can Meet Its Burden Of Establishing That The Error Was Harmless Beyond A Reasonable Doubt, Based On The Entire Record

That error occurred here is undisputed. As the petitioner correctly states, "[t]he dispute in this case is over the consequences of that error." Pet. Brf. 10. Petitioner,

as discussed above, argues that a finding that an error was inherently prejudicial is an insufficient basis upon which to invoke the plain error doctrine of Rule 52(b). If the Court agrees with petitioner, and rules that the finding of prejudice necessary for application of Rule 52(b) must be based on an explicit review of the entire record, the Court should remand this case so that the Court of Appeals can review the specific error which occurred here and assess its prejudicial impact in light of the entire record. *See United States v. Young*, 470 U.S. at 30-31 and n.14 (Brennan, J., concurring in part and dissenting in part) ("When we detect legal error in a lower court's application of the plain-error or harmless-error rules, as here, the proper course is to set forth the appropriate standards and remand for further proceedings. We have followed this procedure in countless cases.") (footnote with citations omitted).

A remand for such a determination is particularly appropriate in the present case given the size and scope of the record. The transcript of the trial alone is over 11,000 pages and there are numerous exhibits and pleadings. The government's theory of the case was extraordinarily complex, involving claims of related loan transactions among three different financial institutions in at least three different states with projects in at least two additional states between and among numerous individuals. The Court of Appeals has already had the opportunity to become familiar with that record, as the oral argument lasted more than two hours, the Court ordered supplemental briefing on the facts after the argument, and the Court ultimately reviewed the entire record in sustaining the respondents' sufficiency of the evidence

claims on three different counts of the indictment. Pet. App. 7a-22a.

Nevertheless, whether that review is conducted by the Court of Appeals on remand or by this Court, the burden will be on the prosecution to establish that the error was harmless beyond a reasonable doubt. The error which occurred in this case, the presence and potential influence of unauthorized persons with deliberating jurors, has correctly been recognized to be an error of constitutional proportions. *Parker v. Gladden*, 385 U.S. at 364-365 (Sixth Amendment right to impartial jury and due process violation); *Turner v. Louisiana*, 379 U.S. at 472-473. As Judge Robinson explained in *United States v. Doe, supra*, since the error is constitutional, the prosecution has the burden of establishing that the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. at 24. *See United States v. Doe*, 903 F.2d 16, 26-28 (D.C. Cir. 1990) (prosecutor's improper summation, although not objected to, was constitutional error since it implicated racial prejudice and court then proceeds to prejudice inquiry under *Chapman* standard).

Applying that standard to the present case, the only conclusion which is supported by the record is that the prosecution cannot show that the Rule 24(c) error which occurred here was harmless beyond a reasonable doubt. Indeed, even if the burden of demonstrating prejudice were on the respondents, the record here would still demonstrate sufficient prejudice to qualify as plain error. Although the jury found the respondents guilty on all counts, the government's proof of guilt was anything but overwhelming. Indeed, the jury found guilt on a number of counts where the evidence was legally insufficient. Pet.

App. 7a-22a. There were numerous other errors which contributed to the verdict which were raised on appeal, which the Court of Appeals itself described as "substantial issues . . . " Pet. App. 3a, n.3. The Court of Appeals has already determined in the appeal of two other defendants that the conspiracy count of the indictment was defective under *McNally v. United States*, 483 U.S. 350 (1987) (*see United States v. Hilling*, 863 F.2d 677 (9th Cir. 1988)) and given the modified "Pinkerton" instruction that was given the jury, the *McNally* error infected the remaining counts of the indictment as well.

In light of the tenuous theory of the prosecution, the debatable evidence of guilt, the numerous errors in the trial and the defective indictment, the likely prejudicial impact of the Rule 24(c) error is sufficient to qualify as an error that should be corrected on appeal under Rule 52(b).

C. Neither Waiver Nor Consent Precluded Plain Error Review

As discussed above, respondent Gray's counsel initially objected to the court's suggestion that the alternates be allowed to sit in on the deliberations. The following day, Gray's counsel remained silent when counsel for another defendant consented to the procedure. J.A. 86, Tr. 10,736. The Court of Appeals concluded that even assuming that the attorney who spoke did so on behalf of all other counsel, that did not preclude the error from being reviewed as plain error. Pet. App. 27a. That ruling is correct and is consistent with established federal law

which holds that even an attorney's ratification or consent to an error does not prevent the error from being recognized as plain error on direct appeal.

The purpose of Rule 52(b) is to provide a means of granting relief on direct appeal from an error in spite of counsel's deficiency in not preventing or objecting to the error. *United States v. Frady*, 456 U.S. at 163. Federal courts have consistently recognized that where an error is sufficiently egregious so as to create the possibility of manifest injustice, thus making it subject to correction on direct appeal under Rule 52(b), it does not matter whether counsel failed to object to the error, ratified the error or consented to the error. *See United States v. Pabisz*, 936 F.2d 80, 83-84 (2d Cir. 1991); *United States v. Aitken*, 755 F.2d 188, 191 (1st Cir. 1985); *United States v. Krosky*, 418 F.2d 65, 66 (6th Cir. 1969) (plain error found even though "[d]efendant's counsel at the conclusion of the charge not only failed to object to any portion of the charge, but affirmatively expressed his agreement with it."). Even where counsel has ratified, approved of, or consented to the error, that does not affect the determination of whether it constitutes plain error under Rule 52(b). *Pabisz*, 936 F.2d at 84 ("In any event, even if defense counsel had ratified the charge, our standard of review would still be plain error.") As one scholar has observed, the reason why the lawyer made a mistake by not objecting to, or by consenting to the error, is not part of plain error review. *See* Resnik, *Tiers*, 57 So. Cal. L. Rev. 837, 917-918 (1984) (comparing process of review between plain error under Rule 52(b) and collateral attack under 28 U.S.C. § 2255). The conduct of respondent Gray's counsel here, even if it can be fairly characterized as

waiver or forfeiture, did not preclude respondent Gray from having the Court of Appeals recognize the error under Rule 52(b).

The Court of Appeals did indicate that if the district court had obtained an on-the-record personal waiver from each of the defendants, the defendants would not have been able to have the Rule 24(c) error recognized on direct appeal, even under the plain error doctrine. Pet. App. 25a-27a. Apparently the Court of Appeals reached this question because prior Ninth Circuit cases had ruled that it is not error to fail to discharge the alternate jurors if the defendant personally consents to the procedure and that personal consent is reflected in the record. Pet. App. 25a *citing United States v. Crisco*, 725 F.2d 1228, 1230 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984); *United States v. Foster*, 711 F.2d 871, 885-86 (9th Cir. 1983), *cert. denied* 465 U.S. 1103 (1984). It is not necessary to resolve whether the Court's concern was well founded (*i.e.*, whether a personal on-the-record waiver from each of the defendants precludes plain error review under Rule 52(b)), since there was no such waiver here.

Unless petitioner can point to something in the record which suggests that respondents personally consented to the error, nothing more needs to be said about this question.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM J. GENEGO,*
Attorney
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401

SHERYL GORDON MCCLOUD
Attorney
1111 Third Avenue, Suite 1060
Seattle, Washington 98101-3202

*Counsel of Record for
Respondent Raymond M. Gray

September, 1992

No. 91-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

GUY W. OLANO, JR. and RAYMOND M. GRAY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT GUY W. OLANO, JR.

CARTER G. PHILLIPS *
CHRISTOPHER R. DRAHOZAL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Respondent Guy W. Olano, Jr.

* Counsel of Record

September 1992

QUESTION PRESENTED

Whether the court of appeals properly deemed reversible the district court's plain error of allowing alternate jurors to be present during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c).

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IN THE

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No. 91-1306

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GUY W. OLANO, JR. and RAYMOND M. GRAY,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT GUY W. OLANO, JR.

STATEMENT OF THE CASE

On December 8, 1986, Respondent Guy W. Olano, Jr. and eight co-defendants, including Respondent Raymond M. Gray, were charged in a multi-count indictment alleging a loan kickback scheme among officers and directors of several savings and loan associations. Olano was the Chairman of the Board of Directors of Alliance Federal Savings & Loan in Kenner, Louisiana.[1] He was charged

[1] The indictment was returned in United States District Court for the Western District of Washington. One of the savings and loans, Home Savings & Loan Association, was located in Seattle.

with conspiracy, in violation of 18 U.S.C. § 371; wire fraud, in violation of 18 U.S.C. § 1343; interstate transportation of stolen property, in violation of 18 U.S.C. § 2314; misapplication of funds, in violation of 18 U.S.C. § 657; two counts of making false statements, in violation of 18 U.S.C. § 1006, and submitting false loan documents for the purpose of influencing a savings and loan association, in violation of 18 U.S.C. § 1014. Pet. App. 4a.

The trial of Olano, Gray, and five of the co-defendants began on March 2, 1987. J.A. 4-5. Fourteen jurors initially were selected to hear the evidence. No alternates were designated. Instead, each side reserved one challenge to be used at the end of trial, and the jurors challenged would be the alternates. J.A. 20-21.

Near the end of trial, the district court urged counsel to allow the alternates to stay with the jury during deliberations. Specifically, the court stated:

> My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just to sit in on deliberations.

J.A. 79. After making its suggestion, the court then explained in some detail what it saw as the advantages from using this procedure, as follows:

> It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then just kind of get kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

J.A. 79.

Later the same day, the district court again raised the issue. This time Respondent Gray's attorney objected to the alternates' presence in the jury room:

> THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?
> MR. ROBISON [counsel for Gray]: We would ask they not.
> THE COURT: Not.

J.A. 82.

Apparently, an additional off-the-record discussion of the matter occurred and the next day the following exchange occurred on the record:

> THE COURT: Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
> MR. KELLOGG [counsel for co-defendant Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

J.A. 86. Olano's counsel remained silent during this exchange.

The district court made plain its pleasure with counsel's action. The court praised counsel for accepting the suggestion that the alternates be present during jury deliberations: "I'm kind of glad you reached that deci-

sion, Counsel. I kind of think they deserve it. They really have been just a superb jury, and I think they'll be glad." J.A. 87.

At the end of its instructions, the district court informed the jurors that all 14 of them would be present for deliberations, and it instructed that the two who would be designated as alternates were not to participate. The court stated:

> [W]hat we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate.

J.A. 89-90. The court then announced the names of the alternates, and the jury retired for deliberations. The next day the court granted the request of one of the alternates to be excused. J.A. 5. The other alternate remained with the jury throughout deliberations, which lasted from May 28th through June 3rd, 1987. J.A. 5-6.

The jury found Olano guilty on eight of the nine counts on which he was charged. Gray was convicted on all counts on which he was charged. Two co-defendants, Davy Hilling and David P. Neubauer, were acquitted on all substantive counts but found guilty of conspiracy. Their convictions were subsequently overturned on appeal. *United States* v. *Hilling*, 891 F.2d 205 (9th Cir. 1988). The other three defendants were acquitted of all charges. Olano was sentenced to three consecutive five-year terms to be followed by five years probation, which was later reduced, J.A. 7r, and ordered to make restitution. Because Olano was in custody throughout trial and while

the appeal was pending, he has served his sentence and has been released on parole.

The court of appeals reversed. The court held that the evidence was insufficient to convict Olano on two counts and Gray on three counts.[2] Pet. App. 17a, 20a. The court then set aside their convictions on all remaining counts. It held that the district court violated Federal Rule of Criminal Procedure 24(c) by allowing the alternates to be present during jury deliberations, an error which "falls within the plain error doctrine." Pet. App. 30a, n.23.

The court of appeals found that Rule 24(c) unambiguously requires alternates to be discharged when the jury retires to deliberate. Moreover, the court observed that, in amending the Federal Rules of Criminal Procedure in 1983, the Advisory Committee squarely rejected the procedure followed by the district court in this case because of the "inherent constitutional and practical difficulties with such practices." Pet. App. 24a. Thus, the court of appeals concluded, the plain language of the Rule, the Advisory Committee notes, as well as Ninth Circuit precedent "clearly establish" that the procedure followed by the district court was erroneous. *Id.*

Although by its terms Rule 24(c) does not allow any waiver, the court of appeals cited prior cases in which the Ninth Circuit had allowed defendants personally to consent to waiver of its protections. In this case, however, Olano and Gray did not give their personal consent. Indeed, the court noted that the record provides "some support" for Olano's statement that he was not even present when counsel by their silence consented to allowing the alternates to be present during deliberations. Pet. App. 6a & n.6. Although neither Olano's counsel nor Gray's counsel expressly consented to the procedure, the

[2] The court of appeals rejected Olano's contention that the evidence was insufficient on two other counts. Pet. App. 18a, 22a.

court of appeals "assume[d], *arguendo*, that co-defendant's counsel spoke as counsel for all defendants on this issue." Pet. App. 27a. Nevertheless, because defendants had not personally consented, the court of appeals held that the district court "did not obtain valid consents from the defendants to deviate from Rule 24(c)'s mandatory requirements." Pet. App. 28a.

Finally, the court of appeals concluded that the district court's violation of Rule 24(c) was "inherently prejudicial" to the defendants. The presence of alternates during deliberations "infringes upon the jury's privacy and the secrecy of the jury process." *Id.* The court of appeals found that a court "cannot fairly ascertain" whether alternates participated in deliberations in a given case. Moreover, even if alternates remained silent while in the jury room, they may nonetheless influence the jury through "facial" expressions, gestures or the like." *Id.* (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)). Because of the "difficulty of ascertaining the numerous, and often subtle ways" alternate jurors can affect deliberations, and because "their presence may in fact affect the deliberating jurors' ultimate determination," the court of appeals found it appropriate to treat the violation of Rule 24(c) as inherently prejudicial. *Id.*

SUMMARY OF ARGUMENT

The plain error doctrine of Federal Rule of Criminal Procedure 52(b) authorizes a court of appeals to review "plain errors or defects" that "affect[] substantial rights," even though those errors or defects "were not brought to the attention of the court." Accordingly, errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936), or that would "undermine the fairness of the trial and contribute to a miscarriage of justice," *United States* v. *Young*, 470 U.S. 1, 20 (1985), require reversal.

A. In this case, the court of appeals properly deemed reversible the district court's error of allowing alternate jurors to be present during jury deliberations. That error was plain and obvious and rendered meaningless Congress' absolute command that alternates "shall be discharged" when the jury retires to deliberate. Fed. R. Crim. P. 24(c). The procedure the court proposed and implemented was in direct violation of Rule 24(c), and, in fact, had been expressly rejected by the Advisory Committee as "subject to practical difficulty and to strong constitutional objection." Fed. R. Crim. P. 23(b), advisory committee notes to 1983 amendment (quoting C. Wright, *Federal Practice and Procedure* § 388 (1969)).

B. The district court's error "affect[ed] substantial rights" of Olano. Rule 24(c) protects absolutely the deliberations of the jury from intrusion. Accordingly, the district court's direct affront to Congress' judgment as to what procedure best protects the criminal justice system "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Atkinson*, 297 U.S. at 160.

In addition, the district court's violation of Rule 24(c) affected substantial rights because it was inherently prejudicial to respondents. Petitioner clearly is in error in urging that a defendant asserting plain error on direct appeal must demonstrate "specific prejudice." That standard is reserved for cases involving collateral attacks on convictions that have become final and has no application to this case. *United States* v. *Frady*, 456 U.S. 152, 166 (1982).

Applying the proper standard, the court of appeals correctly recognized that the presence of alternate jurors during deliberations was "inherently prejudicial" to a defendant. A finding of inherent prejudice is proper because preserving the privacy and secrecy of jury deliberations precludes showing prejudice in a particular case, because the very presence of alternates inevitably chills

free and open discussion, and because it is fanciful to suppose that the alternates did not express their views in some manner to the jury.

The record of this case on appeal confirms that the jury here rendered a verdict that was seriously flawed in a number of respects, making its deliberations suspect. Therefore, it is fair to assume that the trial court's error "undermined the fairness of the trial and contributed to a miscarriage of justice." *Young*, 470 U.S. at 16, n.14.

C. Despite the plain and prejudicial error below—an error invited by the district court, not by the defendants, and an error to which the prosecution never objected—the United States urges this Court to uphold Olano's conviction by invoking the assertedly "huge" costs of reversal in this case. Pet. Br. 25-26. But judicial efficiency is no reason to ignore blatant and prejudicial violations of the Federal Rules of Criminal Procedure, and thereby substitute the district court's judgment for that of Congress concerning the proper procedure to ensure the fair *and* efficient conduct of criminal trials.

Moreover, petitioner's position ignores altogether the fundamental predicate of the plain error rule—that the error be plain. Correcting the error here, which was so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it," *Frady*, 456 U.S. at 163, enhanced, rather than detracted from, the efficient conduct of criminal proceedings and requires reversal of respondents' convictions.

ARGUMENT

THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT COURT'S PLAIN ERROR OF ALLOWING ALTERNATE JURORS TO BE PRESENT DURING JURY DELIBERATIONS IN VIOLATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 24(c).

By its terms, Federal Rule of Criminal Procedure 52(b) authorizes courts to notice "plain errors or defects"—errors or defects in the trial that are "obvious." See, *e.g.*, *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *Peretz* v. *United States*, 111 S. Ct. 2661, 2678 (1991) (Scalia, J., dissenting). The very premise of Rule 52(b) is that certain errors are so obvious that the district court and the prosecutor have a duty to avoid them even if defense counsel fails to sustain an objection over the court's insistence to proceed. The affront to the manifest command of the Federal Rules is attributed to them and the system of justice rightly holds them accountable by setting aside the tainted verdict. As this Court stated in *United States* v. *Frady*, 456 U.S. 152 (1982), Rule 52(b) allows review of an "error so 'plain' that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.* at 163.

The fact that the plain error rule is limited to obvious errors makes it an appropriate exception to the general requirement that a defendant must make and press a contemporaneous objection to preserve an issue for appeal. When an error is obvious, a defendant need not bring "the claim of error to the trial court's attention [to] provid[e] the court an opportunity to resolve the matter as the defendant wishes," Pet. Br. 13; the court—and the prosecutor—are charged with avoiding such errors in order to preserve the "the fairness, integrity [and] public reputation of judicial proceedings."[3] *Atkinson*, 297 U.S.

[3] Likewise, when an error is obvious, the "risk of manipulation by a defendant," Pet. Br. 13, is best avoided by relying on the

at 160. Moreover, the failure of defense counsel to bring to the attention of the court an error that is plain and obvious raises substantial questions about the adequacy of counsel's representation; an appellate court properly is reluctant to hold a defendant bound by counsel's manifest failing. See 3A C. Wright, *Federal Practice & Procedure* § 856, at 341 (2d ed. 1982).

To be sure, not every "obvious" error justifies reversal. But reversal under the plain error standard is required if the error impairs "substantial rights" by affecting significantly the "integrity or public reputation of judicial proceedings" or "by seriously affect[ing] the fairness" of the proceedings. *Atkinson*, 297 U.S. at 160; *United States* v. *Young*, 470 U.S. 1, 20 (1985). In this case, the blatant disregard of Rule 24 affects substantial rights as declared by Congress. At a minimum, the court's insistence on violating an express Federal Rule of Criminal Procedure certainly undermines the integrity of the judicial process. Moreover, the intrusion into the sanctity of the jury deliberations casts serious doubt on the public reputation of the court. Finally, the error is inherently prejudicial and its effect on the seriously flawed jury verdict, in this case, was substantial.

A. The District Court Committed An Obvious And Deliberate Error In Ignoring The Plain Mandate Of Rule 24(c).

The district court's error of allowing alternate jurors to accompany the jury during deliberations was a plain and obvious error.[4] The relevant provisions of Rules 23

district court and the prosecutor to observe the plain and obvious provisions of the law.

[4] As the court of appeals recognized, and petitioner acknowledges, Pet. Br. 10, "Rule 24(c) is phrased in unmistakably mandatory language and does not expressly provide for any waiver" of its protection. Pet. App. 24a-25a. The court of appeals allowed for the possibility of such a waiver, but only where "the record show[s]

and 24 are simple and straightforward. A jury consists of twelve persons, but, with the approval of the court, the defendant and the prosecutor may stipulate in writing to a jury of less than twelve. Fed. R. Crim. P. 23(b). The parties also may stipulate in writing—with the approval of the court—that a verdict may be returned by fewer than twelve jurors if the court must excuse a juror for cause after trial begins. *Id.*

In addition, up to six alternate jurors may be selected. Fed. R. Crim. P. 24(c). If a regular juror is disqualified or becomes unable to carry out his or her duties *before* the jury retires for deliberations, the juror shall be replaced by an alternate. Once the jury has retired, any alternates who have not replaced regular jurors *shall be discharged*. If a regular juror thereafter must be ex-

that the defendants, and not merely their counsel, actually consented to the waiver of their rights." Pet. App. 25a.

This alternative holding is correct. Rule 24(c) must be read in conjunction with Rule 23, which otherwise governs the composition of the jury during deliberations and which requires a defendant personally to consent to waiver of its protections. The two rules are two sides of the same coin; indeed, the 1983 amendment to the Federal Rules, which rejected the substitution of alternates after deliberations had begun in favor of allowing a jury of eleven to return a verdict if the trial court so orders, was made to Rule 23 rather than Rule 24. *See* Fed. R. Crim. P. 23(b), advisory committee notes to 1983 amendment. These closely related provisions should be construed in tandem, with the stated waiver procedures embodied in one naturally applied to the other. *See, e.g.*, 2A N. Singer *Sutherland Statutes & Statutory Construction* § 46.05, at 103 (5th ed. 1992); *see also United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 870-71 (4th Cir. 1964).

It is undisputed that the district court failed to obtain Olano's personal consent to the presence of the alternates in the jury room. Moreover, Olano was not even in the courtroom at the time and so had no opportunity to voice his personal consent or objection to the procedure. *See infra* pp. 15-16. Because Olano "ha[d] no opportunity to object" to the procedure, "the absence of an objection does not thereafter prejudice" him and the violation of the Rule can be reviewed without recourse to the plain error rule. Fed. R. Crim. P. 51.

cused for cause, the court has discretion to allow the remaining eleven jurors to return a valid verdict. Fed. R. Crim. P. 23(b).

The Rules do not permit alternate jurors to be present during jury deliberations, regardless of whether the alternates are instructed not to participate in those deliberations. The Rules do not provide for alternate jurors to be present during a portion of deliberations and thereafter be excused before the jury reaches a verdict. The Rules do not allow replacing a regular juror with an alternate juror, in the event of illness or disqualification, after the jury has retired to deliberate. The language of Rule 24(c) could not be clearer: alternate jurors "shall be discharged" after the jury retires for deliberations.

The procedure followed by the district court in this case was expressly considered and rejected by the Advisory Committee and this Court in drafting and promulgating the Federal Rules. It is striking that the Government's analysis completely ignores this history. Thus, its assertion that the protections of this Rule should be cavalierly ignored is based solely on its self-serving judgments about prejudice. Congress, however, in approving the Rule clearly made the opposite judgment.

An early draft of the Rules provided that alternate jurors should not be discharged until the jury itself was discharged. This Court asked the Committee whether it was satisfied "that it is desirable or constitutional that an alternate juror may be substituted after the jury has retired and begun its deliberation." L. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962). Thereafter, the Committee changed the Rule to require that alternate jurors be discharged when the jury retired, and in that form the Rule was promulgated by this Court and approved by Congress. *Id.* at 50, 53-54.

Subsequently, in 1983, the Advisory Committee considered an amendment to the Rules that would have allowed an alternate juror to be substituted for a regular juror

after the jury retired for deliberations. The Committee rejected that procedure. Instead, it amended Rule 23 to allow, in the district court's discretion and without the agreement of the parties, a valid verdict to be returned by the remaining eleven jurors. In support of its decision, the Committee quoted the following with approval:

> To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Fed. R. Crim. P. 23(b), advisory committee notes to 1983 amendment (quoting C. Wright, *Federal Practice & Procedure* § 388 (1969)). The Committee explained specifically that, "[a]s for the possibility of sending in the alternates at the very beginning with instructions to listen but not to participate until substituted, this scheme is likewise attended by practical difficulties and offends 'the cardinal principle that the deliberations of the jury shall remain private and secret in every case.'" *Id.* (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964)).

As a result, it is not surprising that the courts of appeals—even those on which petitioner otherwise relies, Pet. 7-9; Reply Br. 4-6—have unanimously condemned the failure to abide by the plain terms of Rule 24(c). *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 873 (4th Cir. 1964) ("We deem it most unwise to place the judicial stamp of approval upon this attempt of court and counsel to circumvent the established rule and to substitute unauthorized procedures"); *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973) (Rule 24(c) "is a mandatory requirement that should be scrupulously followed. Because any benefit to be derived from deviating from the Rule is unclear and the possibility of preju-

dice so great, it is foolhardy to depart from the explicit command of Rule 24"); *United States* v. *Reed*, 790 F.2d 208, 211 (2d Cir.) ("We view with disfavor local departures from that norm made on an ad hoc basis and by resort to stipulations, and the procedure followed here should not be repeated"), *cert. denied*, 479 U.S. 954 (1986); *United States* v. *Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982) ("We disapprove this procedure . . ."); *United States* v. *Beasley*, 464 F.2d 468, 470 (10th Cir. 1972) (presence of alternates during deliberations "destroys the sanctity of the jury and a mistrial is necessary"); *United States* v. *Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) (Rule 24(c) "is couched in mandatory language" and " 'should be scrupulously followed' ") (quoting *Allison*, 481 F.2d at 472).

In the face of this clear and unanimous authority, the district court in this case not only allowed the alternates to accompany the jury during deliberations but affirmatively recommended the procedure to counsel. The district court raised the possibility on its own initiative, explaining that "I know many judges have done it with no objection from counsel." In addition to showing "courtesy" to the alternate jurors, according to the court, "[o]ne of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open." J.A. 79. After telling counsel to "[t]hink about it and let me know," the court subsequently raised the matter again with counsel. J.A. 82. This time, counsel for respondent Gray objected. Following an off-the-record discussion, however, counsel acquiesced in the court's suggestion. J.A. 86. The court praised their decision, stating that "I'm kind of glad you reached that decision, Counsel. I kind of think [the alternates] deserve it." J.A. 87. The district court plainly was in error.

The prosecutor likewise was "derelict" in countenancing this error. *United States* v. *Frady*, 456 U.S. 152,

163 (1982). "Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." ABA, Standards for Criminal Justice, Standard 3-1.1(c) commentary at 3.7 (2d ed. 1980). Thus, as one commentator states, "[i]f the intelligent prosecutor wishes to guard against the possibility of reversible error, he cannot rely on the incompetence or inexperience of his adversary but, on the contrary, must often intervene to protect the defendant from the mistakes of counsel." 8B J. Moore, *Moore's Federal Practice* ¶ 52.02[2], at 52-7 (2d ed. 1991).

In this case, the prosecutor undisputedly was present during all of the exchanges concerning the alternates cited by petitioner. Yet, despite the plain impermissibility of allowing the alternates to be present during deliberations, at no point did the prosecutor object to or raise any question about the procedure suggested by the district court. There is no question that if the prosecutor had informed the district court that the procedure it proposed violated Rule 24(c) or that the Government preferred to comply fully with the Federal Rules, the court would not have continued to pursue it with defense counsel. Therefore, the prosecutor, too, bears responsibility for the plain error.

Finally, defense counsel failed to protect Olano's interests adequately when he did not object to the district court's obvious error. Counsel stood quietly each time the question of the alternates was discussed, expressing neither agreement nor disagreement, and instead allowed co-counsel to speak for him. Even if counsel's silence is taken as consent to the procedure proposed by the district court, consent to such an obvious error itself raises serious question about the adequacy of counsel's representation. Moreover, the court of appeals found "some support" for Olano's statement that he was not even present in the courtroom when consent to the erroneous procedure was

given.[5] Pet. App. 6a & n.6. Because Olano had been present the previous day when Gray's counsel objected to the district court's proposal, Olano had every reason to believe that the alternates would not be allowed to accompany the jurors during deliberations.[6] Under these circumstances, Olano should not be bound by his counsel's inadequacies.[7]

Like a trial lawyer who seeks to stipulate to a particular fact in the hopes of keeping damaging testimony

[5] The record reveals that the marshal frequently failed to return Olano to the courtroom on a timely basis after lunch or other break in trial. J.A. 57-58, 73, 75-76. The exchange at issue occurred almost immediately after lunch. J.A. 85-86.

[6] Olano's ability to make judgments independent of his counsel is demonstrated by counsel's request, on the first day of trial, that Olano be allowed to conduct cross-examination of certain witnesses associated with the Federal Home Loan Bank Board. Counsel assured the court that his client "being a lawyer and being a lawyer who is experienced in banking law, is in a better position to make inquiry of these witnesses," although counsel was willing to see whether "as we get closer in time to these witnesses I can see whether I feel comfortable being in the position to cross-examine witnesses who may very well be key to the government's case against my client." J.A. 63.

[7] Petitioner's assertion that defendants here sought to manipulate the course of these proceedings, Pet. Br. 13-14, is patently ridiculous. Petitioner's suggestion that the defendants intentionally misled the district court at trial so that Olano could raise the issue in his *pro se* brief on appeal with the confidence that the court of appeals would reverse not only his, but also Gray's, convictions is absurd.

It would be more plausible to conclude that the prosecutor agreed to this procedure in order to curry favor with the judge and to ensure that the juror the defense most wanted removed from the jury's deliberations would be present for the presumptively pro-prosecution effect his or her presence might have. The prosecutor might have assumed that any convictions obtained through this procedure ultimately would be upheld on appeal simply because the trial lasted three months and an appellate court might be concerned about the expense of a retrial, precisely the argument the Government makes to this Court. *See* Pet. Br. 25-26.

from being heard directly by the trier of fact, petitioner casually "acknowledge[s]" that the district court violated Rule 24(c). Pet. Br. 10. Petitioner's willingness to concede immediately and unequivocally that error occurred—even if that concession is expressed only in a single, terse paragraph—is telling. The Government does not readily confess error, and its readiness to admit that error occurred here strongly supports the court of appeals' conclusion that the error below was plain.

Although petitioner acknowledges that error occurred, it wholly fails to address whether that error was plain and obvious. Petitioner justifies this failure on the ground that this case turns not on whether the district court committed an error, but rather on "the consequences of that error." *Id.* But the plain error rule does not allow such a facile separation of an error from its "consequences." To the contrary, under the plain language of Rule 52(b), the "consequences" of the district court's violation of the Rule—by which petitioner evidently means whether Olano's convictions should have been reversed—depend not only on whether there was an error, and whether that error was prejudicial, but also on whether the error was plain and obvious. See, *e.g.*, *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *Peretz* v. *United States*, 111 S. Ct. 2661, 2678 (1991) (Scalia, J., dissenting). The more obvious and unjustified the error, the less reasonable it is to ignore that error unless Congress has clearly indicated that the matter is trivial or the Court can confidently conclude that the error could not possibly have been harmful. Here, the violation of Rule 24(c) requires reversal.

B. The Deliberate Violation Of Federal Rule Of Criminal Procedure 24(c) "Affect[s] Substantial Rights" Within The Meaning Of Rule 52(b).

The second predicate for application of Rule 52(b)—that the error be one "affecting substantial rights"—likewise is satisfied in this case for several reasons, most

of which petitioner ignores. As the court of appeals correctly held, the district court's decision to allow the alternate jurors to accompany the jury during deliberations was "inherently prejudicial" to Olano's substantial rights. Prejudice is inherent in a violation of Rule 24(c), in part because the Rule was adopted in light of the inherent risk of harm, and, in part, because a court cannot evaluate the degree of any "specific" prejudice to the defendant without violating the secrecy and privacy of jury deliberations.

Petitioner argues that the court of appeals' reliance on inherent prejudice was erroneous because it is never appropriate to base a finding of plain error on inherent prejudice, and, in any event, because the presence of alternates is not prejudicial. Petitioner's contention that a finding of "specific prejudice" is necessary to find plain error ignores the language of Rule 52(b), is inconsistent with decisions of this Court, and flatly misconstrues the plain error rule. Likewise, petitioner's speculation that the presence of alternates would have no effect on deliberations is erroneous and merely confirms that a finding of inherent prejudice is warranted—because it is impossible to do anything but speculate about the effect on deliberations without invading the privacy of the jury.

1. *The District Court's Violation Of Federal Rule 24(c) Constituted An Error That Casts Doubt On The Integrity Of The Judicial Process.*

In allowing the alternates to be present during jury deliberations, the district court deliberately ignored Congress' unambiguous command that alternate jurors "shall be discharged" when the jury retires to deliberate. This blatant disregard of a Federal Rule of Criminal Procedure, which incorporates this Court's and Congress' reasoned decisions as to the procedure to be followed in criminal trials and which forecloses the very inquiry into prejudice petitioner asks this Court to undertake, is inherently prejudicial to defendants and "seriously affect[s]

the fairness, integrity [and] public reputation of judicial proceedings." *Atkinson*, 297 U.S. at 160.

a. The Federal Rules of Criminal Procedure represent the considered judgment of this Court and of Congress as to the proper procedures to be followed in criminal prosecutions in the federal courts. The Rules "are intended to provide for the just determination of every criminal proceeding." Fed. R. Crim. P. 2. They apply to "all criminal proceedings" in the United States District Courts, in the United States Courts of Appeals, and in this Court. Fed. R. Crim. P. 54(a). Although the district courts may adopt local rules governing practice before them, those rules must be consistent with the requirements of the Federal Rules. Fed. R. Crim. P. 57.

In this case, petitioner asks this Court to countenance the flagrant disregard of one such rule, Rule 24(c), at the behest of the district court and with the full awareness of the prosecution, on the ground that violation of the Rule would never prejudice defendants. Although petitioner goes on at length about what would not constitute prejudice from a violation of Rule 24(c), it is remarkable that petitioner nowhere suggests what would constitute prejudice. According to petitioner, the silent presence of alternates is not prejudicial. Pet. Br. 23. Nonverbal communication with deliberating jurors through body language is not prejudicial. Pet. Br. 24. Verbal participation in deliberations is not prejudicial. Pet. Br. 22. Even voting for conviction by alternates would not be prejudicial, because under petitioner's analysis that would be no different from being tried by a jury larger than twelve. Pet. Br. 21.

Petitioner does not limit its argument to cases in which defense counsel consented to violation of the Rule, or even to cases in which defense counsel failed to object to the violation, but broadly sweeps in all violations of Rule 24(c). See Reply Br. 3 & n.2. Apparently, petitioner believes the Rule is pointless because no violation of its

terms would ever result in prejudice to defendants. Accordingly, under petitioner's view, the absolute Rule becomes merely precatory: no appellate court could ever enforce its provisions on appeal. In sum, petitioner's argument is nothing more than a direct assault on the judgment of this Court and Congress in adopting Rule 24(c).

The Advisory Committee, this Court, and Congress necessarily rejected petitioner's view in promulgating Rule 24(c). By its terms, the Rule establishes an absolute requirement that alternates be discharged when the jury retires to deliberate. The Rule does not allow the parties to agree to a procedure other than that provided by its terms, nor does it allow the district court to override its protections as a courtesy to the alternates. Indeed, in light of the plain language of Rule 24(c), the practice followed by the district court in this case has absolutely nothing to commend it. If petitioner is correct that the Rule is pointless, which of course it is not, see *infra* pp. 34-42, then the proper course is to amend Rule 24(c) so that alternates' feelings can be protected as the district court proposed. But short of an amendment to the Rule, this Court's and Congress' judgment that prejudice is real should prevail.

The district court's error was not a mere "technical violation" of Federal Rule 24(c), Reply Br. 8, but an absolute and total disregard for the very protection it provides to defendants. The purpose of the Rule is not to allow alternates to go home before the regular jurors. Rather, the Rule requires that alternates be discharged when the jury retires to deliberate to preserve the essential privacy and secrecy of jury deliberations. See *infra* pp. 34-36. By allowing the alternates to be present, the district court invaded the secrecy and privacy of the deliberations. The court violated the Rule by depriving the defendants of the precise protection the Rule was intended to afford. Such an error properly is reversed under the plain error rule.

It is the sort of error that, under *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), involves a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[8] *Id.* at 1265. The presence during deliberations, the most critical part of trial, of persons who did not share the awesome responsibility of having to decide whether to deprive the defendants of their liberty, goes to the very heart of the jury's decisionmaking process. Indeed, errors affecting the composition of the jury are precisely the sort of errors this Court has held in prior cases to be inherently prejudicial. See, *e.g.*, *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion) (improper excusal for cause of juror who was opposed to death penalty); *id.* at 669 (Powell, J., concurring in part and concurring in the judgment); *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986) (racial discrimination in selection of members of grand jury).[9]

b. Rather than accepting the judgment of Congress and this Court as established in Rule 24(c), petitioner asks this Court to speculate that violation of the Rule would not be prejudicial to defendants. Petitioner obviously cannot refer to the record to support its position that the presence of the alternates had no effect on the jury's deliberations; there is no record of what was said or done during deliberations. Instead, petitioner can only

[8] Significantly, petitioner does *not* contend that the presence of alternates during deliberations is "trial error," an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1264 (1991).

[9] Even in cases such as *Remmer* v. *United States*, 347 U.S. 227 (1954), in which a juror became aware of an FBI investigation of allegations that he had been improperly contacted concerning the trial, this Court held that prejudice to the defendant should be presumed with the burden to "rest[] heavily" on the Government to disprove the existence of prejudice. *Id.* at 229.

assert that it "defies reality," Pet. Br. 23, is "hard to imagine," *id.* at n.9, and is "quite unrealistic," Pet. Br. 24, to suggest that the presence of the alternates could affect the jury's deliberations. The fact that petitioner can only speculate about the likelihood of prejudice itself demonstrates that blatant violation of Rule 24(c) is inherently prejudicial.

As petitioner acknowledges, this Court has included in the category of errors that are inherently prejudicial "errors whose impact on the trial cannot easily be assessed." Pet. Br. 17. Thus, in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), the Court held that joint representation of defendants with conflicting interests is inherently prejudicial on the ground that "an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Id.* at 491. Similarly, in *Waller* v. *Georgia*, 467 U.S. 39 (1984), this Court unanimously held that violation of the right to public trial is inherently prejudicial. The Court agreed with the Third Circuit's statement that "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'" *Id.* at 49, n.9 (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3d Cir. 1969)); see *id.* ("'[b]ecause demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied'" (quoting *State* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980)).[10]

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[10] *See also Riggins* v. *Nevada*, 112 S. Ct. 1810, 1816 (1992) ("Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different . . . would be purely speculative"); *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 812-13 (1987) (plurality opinion) ("Determining the effect of [the appointment of an interested prosecutor] thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record") (emphasis omitted); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986) (plurality opinion) ("when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (effect of trial court's inquiry as to numerical division of jury "will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts").

In the present case, assessing the impact of the alternates on the jury's deliberations is likewise impossible. Jury deliberations are secret; no record exists of what is said or done in the jury room.[11] Attempts after the fact to reconstruct the course of deliberations, especially in a complicated case such as this one, would unquestionably fail. As a practical matter, "[i]t would certainly be impossible to recreate at this point every move, every expression [the alternate] might have made during the several hours [—or days—] of deliberations. Even if it were determined exactly what he did or said, it would be difficult to tell how or whether his actions affected the other jurors." *State* v. *Cuzick*, 530 P.2d 288, 290 (Wash. 1975). Indeed, Rule 24(c) was crafted as an absolute rule precisely because of the "practical" problems of sorting out the effects of the alternates' presence during the deliberations. Again, Congress' judgment demands respect from this Court.

Moreover, Federal Rule of Evidence 606 expressly bars juror testimony to "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith."[12] Rule

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[11] Indeed, making such a record is illegal. 18 U.S.C. § 1508; *see infra* pp. 35-36 & n.21.

[12] In its Reply Brief in support of its Petition for Certiorari, petitioner blithely asserts that if a defendant "believes that he

606 is based on the understanding that detailed inquiries into jury deliberations would undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Tanner* v. *United States*, 483 U.S. 107, 120-21 (1987). It is this very undertaking that Congress and this Court sought to foreclose in adopting Rule 24(c), as "[t]he inquiry at a hearing under a standard which requires a showing of prejudice [from the presence of alternates during deliberations] is itself a dangerous intrusion into the proceedings of the jury." *United States* v. *Beasley*, 464 F.2d 468, 470 (10th Cir. 1972); see also *Cuzick*, 530 P.2d at 290 (the "primary effect" of such an investigation "would be to further invade the jury room and impose on those who served on it").

Although the court of appeals relied substantially on the fact that it could not "fairly ascertain whether in a given case the alternate jurors followed the district court's prohibition on participation," Pet. App. 28a, petitioner ignores this consideration altogether. Nowhere in its brief does petitioner address how a court should inquire into whether a defendant suffered "specific prejudice" in a manner that preserves the secrecy of the jury and comports with Federal Rule of Evidence 606(b). Instead,

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may have been prejudiced, the district court has authority to determine 'whether any outside influence was improperly brought to bear upon any juror.'" Reply Br. 6 (quoting Fed. R. Evid. 606(b)). Petitioner overlooks the obvious contradiction between its positions that alternates are an "outside influence" within the meaning of Rule 606(b) but are not "'strangers' to the jury room whose presence constitute[s] a threat to the sanctity of the jury's deliberations." Pet. Br. 24. In any event, examination of jurors as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror" would be insufficient to determine in a meaningful way whether the presence of the alternates prejudiced the defendant in a specific case. *See infra* pp. 34-42.

petitioner asserts that a showing of specific prejudice is required and speculates about why no prejudice is likely. This resort to pure speculation simply confirms that violation of Rule 24(c) is inherently prejudicial.

c. The wisdom of Congress' adoption of an absolute rule is made clear by the actions of the district court in this case. The record shows that it was the court that favored the procedure and that defense counsel decided to go along to avoid offending the court. The district court proposed allowing the alternates to accompany the jury, and explained to defense counsel its view of the advantages of such a procedure while neglecting even to mention any disadvantages. The court thereafter on its own initiative raised the matter again with counsel, and brushed aside Respondent Gray's counsel's objection. Once counsel had agreed with the court's suggestion, however, the court praised the decision and proceeded to do what it had wanted to do all along. The district court should be upholding the categorical protections the Federal Rules provide for defendants, not disregarding them whenever it so chooses.

The district court's deliberate disregard of Rule 24(c) was not an isolated incident, which this Court's grant of certiorari confirms. As the district court said, "many judges have [allowed alternates to be present during deliberations] with no objections from counsel," J.A. 79, although it is impossible to know how often the lack of objection results from counsel giving in to a court's preference. The courts of appeals continue to be faced with cases in which district courts have ignored the plain requirements of Rule 24(c), despite their repeated admonitions that the Rule should be followed. Failing to uphold the court of appeals in this case would send a message to the district courts, as well as to prosecutors, that the Federal Rules do not mean what they say, and that the courts and the parties are free to disregard their plain and unambiguous terms. Only a reversal will stop

this disregard of a plain Federal Rule of Criminal Procedure.

This Court's ability to uphold the court of appeals' necessary and definitive action is not foreclosed by the decision in *United States* v. *Young*, 470 U.S. 1 (1985). In *Young*, this Court reversed a decision by the court of appeals which had held improper argument by the prosecutor to be plain error on the basis of a supervisory rule adhered to by the circuit court. The United States had asserted in *Young* that the prosecutor's argument was not even error because it had been "invited" by improper argument of defense counsel. Brief for the United States at 15-26, *United States* v. *Young*, 470 U.S. 1 (1985) (No. 83-469). This Court rejected the Government's position, finding the prosecutor's argument to be error, but held that it was not plain error under Rule 52(b).

It is true that this Court stated in a footnote in *Young* that "[a] *per se* approach to plain-error review is flawed." 470 U.S. at 16, n.14. This language cannot be divorced from the issue in *Young*, which involved a supervisory rule adopted by a court of appeals. Compare *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (court of appeals may not rely on supervisory power to avoid harmless error inquiry). It cannot have the same categorical meaning when the violation is of a plain and clear command of Congress. Congress has determined that Rule 24(c) protects substantial rights of a defendant, and it is not for petitioner or the district court to second-guess that judgment. Just as there cannot be "harmless plain errors," *Young*, 470 U.S. at 16, n.14, so, too, there can not be plain harmless error when the error involves the violation of a Federal Rule of Criminal Procedure that sets out the "framework within which the trial proceeds." *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991).

The error at issue in *Young*—improper argument by the prosecutor—is standard "trial error" of the sort that

this Court has held not to be inherently prejudicial. *Id.* at 1263-64. The Court in *Young* had no reason to, and did not, address whether an error that was both plain and inherently prejudicial satisfied Rule 52(b). Indeed, applying the plain error rule to inherently prejudicial errors necessarily requires some sort of *per se* rule. Unlike trial errors, which may "be quantitatively assessed in the context of other evidence presented" in order to determine whether a defendant was prejudiced, *id.* at 1264, by definition, errors that are inherently prejudicial "undermine the fairness of the trial" in every case in which they occur. *Young*, 470 U.S. at 20.

The court of appeals properly found the district court's deliberate disregard for the Federal Rules of Criminal Procedure to be inherently prejudicial to defendants. This unwarranted departure from the unambiguous directive of Congress and this Court "seriously affect[s] the fairness, integrity [and] public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936), and, accordingly, the court of appeals properly reversed respondents' convictions under Rule 52(b).

2. *The Deliberate Violation Of Federal Rule 24(c) Was Inherently Prejudicial To Respondent Olano's Substantial Rights.*

Petitioner wholly fails to address the serious effect of the district court's deliberate disregard of Rule 24(c) on the integrity of the judicial system and the public reputation of the criminal justice process. As shown above, that effect alone is a sufficient basis upon which to uphold the court of appeals. Instead, petitioner argues that the court of appeals applied an improper standard of prejudice under the plain error rule and asserts that violation of Rule 24(c) is not prejudicial to defendants because the presence of alternates has no effect on the jury's deliberations or verdict. Even if these were proper inquiries, petitioner also is wrong on both counts.

a. *The United States Proposes An Inappropriate Standard For Prejudice Under The Plain Error Doctrine.*

Initially, petitioner is mistaken when it argues that a court may never notice a plain error on the basis of its "inherent prejudice," but instead must find "specific prejudice" to the defendant. Pet. Br. 17. The plain language of Rule 52(b) does not require a finding of specific prejudice to the defendant. Instead, on its face, the Rule permits a court to notice any obvious error that is not harmless within the meaning of Rule 52(a), including errors that are inherently prejudicial.[13] The relevant language of the two provisions is virtually identical: Rule 52(b) provides that a court may notice "[p]lain errors or defects *affecting substantial rights*," while Rule 52(a) provides that "[a]ny error, defect, irregularity or variance *which does not affect substantial rights* shall be disregarded." [14]

The distinction between plain error under Rule 52(b) and non-harmless error under Rule 52(a) is not, as petitioner contends, the degree of prejudice required. Instead, as the language of those provisions makes clear, the principal distinction is that the plain error rule applies only to *plain* errors, while the harmless error rule applies to all errors. Any error, even an error that is not obvious, can affect substantial rights. An error that does not affect substantial rights "shall be disregarded" under

[13] *See Peretz* v. *United States*, 111 S. Ct. 2661, 2679 n.* (1991) (Scalia, J., dissenting) (because error not obvious, there is "no occasion to assess its prejudicial impact, *assuming that t is possible*") (citing *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)) (emphasis added).

[14] It is a longstanding rule of statutory construction that, in construing a statute or rule, similar language in related provisions should be construed as having the same meaning. *See, e.g., Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); 2A N. Singer, *Sutherland Statutes & Statutory Construction* § 47.16, at 184 (5th ed. 1992).

Rule 52(a) and cannot be noticed under Rule 52(b). But an error that does affect substantial rights, if not brought to the attention of the court, can only be noticed under Rule 52(b) if it is plain and obvious, which is this case.

Petitioner's examples of cases that purportedly "illustrate the different status of claims of 'inherent prejudice' under the harmless error and plain error rules," Pet. Br. 19, do nothing of the sort. Rather, they simply illustrate errors that, while inherently prejudicial, cannot fairly be characterized as plain. *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), and the right of self-representation, is most telling in this regard. While a defendant plainly has a right to represent himself if he or she so desires, there is no obvious error in appointing counsel to represent him if he does not assert that right. To the contrary, the United States Constitution requires that counsel be appointed in such circumstances.[15] *Gideon* v. *Wainwright*, 372 U.S. 335, 343-44 (1963); see *Faretta* v. *California*, 422 U.S. 806, 835-36 (1975). It is no error at all, much less an obvious one, for the court to carry out the constitutionally mandated right to counsel.

Likewise, the waiver cited by petitioner as occurring in *Levine* v. *United States*, 362 U.S. 610 (1960), involved

[15] As the cases cited by petitioner explain, Pet. Br. 20, "[b]ecause the exercise of the right of self-representation necessarily involves a waiver of the preeminent right to the assistance of counsel, the stringent limitations established by the Supreme Court for the waiver of the right to counsel necessarily define the requirements for exercise of the right of self-representation." *United States* v. *Weisz*, 718 F.2d 413, 425 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). Thus, the right of self-representation "can only be invoked by waiving counsel expressly, knowingly, and intelligently," *United States* v. *Gillis*, 773 F.2d 549, 559 (4th Cir. 1985), and "[i]f on arraignment an indigent defendant stands mute, neither requesting counsel nor asserting the right of self-representation, an attorney must be appointed" because the defendant has not waived the right to counsel. *Brown* v. *Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) (en banc).

contempt proceedings before a grand jury in which any denial of the right to public trial was not obvious. "Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret." *Id.* at 617. The Court recognized that the necessary first step in the contempt proceedings was to read the record of the grand jury proceedings in which the contempt occurred, and that federal law required that step to be conducted without the public being present in the courtroom. See 18 U.S.C. § 1508; Fed. R. Crim. P. 6(d) & (e). Because "[t]he proceedings properly began out of the public's presence and one stage of them flowed naturally into the next," "[t]here was *no obvious point at which*, in light of the presence of counsel, it can be said that *the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion* and establish a conventional public trial." 362 U.S. at 619 (emphasis added).[16]

Accordingly, the court of appeals' holding does not, as petitioner asserts, confuse plain error with non-harmless error. While undeniably a "determination that a particular error can never be harmless within the meaning of Rule 52(a) does not . . . mean that such an error is always 'plain' within the meaning of Rule 52(b)," Pet. Br. 17-18, the court of appeals did not hold otherwise. Instead, that court quite properly held, first, that the district court's error was plain, and, second, that it was inherently prejudicial. Pet. App. 23a-30a. In mischaracterizing the court of appeals' holding, petitioner simply ignores that an error must be plain to be noticed under Rule 52(b).

For these reasons, petitioner is wrong when it suggests that only a requirement of "specific prejudice" can avoid

[16] The other case on which petitioner relies is *Davis* v. *United States*, 411 U.S. 233 (1973). But *Davis* involved a claim for post-conviction relief under 28 U.S.C. § 2255, as petitioner concedes, Pet. Br. 19-20; *see Davis*, 411 U.S. at 235, and so has no application to review of a plain error on direct appeal. *See infra* pp. 31-33.

turning every non-harmless error into a plain error. But not only is a requirement of specific prejudice inconsistent with the plain language of Rule 52(b), it also is inconsistent with this Court's previous decisions distinguishing errors on direct appeal and errors on collateral review. In effect, petitioner seeks to have this Court adopt on direct criminal appeals the "actual prejudice" standard of *Wainwright* v. *Sykes*, 433 U.S. 72 (1972), a standard applied only to defendants seeking post-conviction relief from a criminal conviction. In such cases, the strong interest in finality of judgments requires a showing of cause and actual prejudice before a federal court will overturn a criminal conviction. Because that interest is not at stake when the courts of appeals consider the direct appeal of a criminal conviction, not even under the plain error rule, a less exacting standard of prejudice than that sought by petitioner is proper under Rule 52(b).

Although petitioner carefully avoids labelling its analysis "actual prejudice," its reliance on *Davis* v. *United States*, 411 U.S. 233 (1973)—the only case it cites as requiring a showing of "specific prejudice" to review an inherently prejudicial error not raised at trial, Pet. Br. 19-20—lays bare the true nature of its argument.[17] As petitioner concedes, *Davis* is a case decided under 28 U.S.C. § 2255, the statute governing post-conviction relief for federal prisoners. Davis' conviction had been affirmed on appeal, and one round of post-conviction mo-

[17] This Court, and the courts of appeals, have treated the phrases "actual prejudice" and "specific prejudice" as interchangeable. *See, e.g., Chandler* v. *Florida*, 449 U.S. 560, 588 (1981) (White, J., concurring in the judgment); *United States* v. *Gambino*, 926 F.2d 1355, 1364 (3d Cir.), *cert. denied*, 112 S. Ct. 415 (1991); *United States* v. *Jenkins*, 904 F.2d 549, 556 (10th Cir.), *cert. denied*, 111 S. Ct. 395 (1990); *Aldrich* v. *Wainwright*, 777 F.2d 630, 634 (11th Cir. 1985), *cert. denied*, 479 U.S. 918 (1986); *United States* v. *Kimmel*, 741 F.2d 1123, 1126 (9th Cir. 1984); *United States* v. *Maybusher*, 735 F.2d 366, 369 (9th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985).

tions had been filed and denied before Davis raised his constitutional challenge to the composition of the grand jury. Nevertheless, petitioner asserts that "the principle for which [*Davis*] stands is equally applicable to the plain error doctrine." Pet. Br. 20.

Petitioner's assertion is flatly inconsistent with the "well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Once a criminal conviction has become final, "society's legitimate interest in the finality of the judgment" becomes paramount. *Id.* at 164. "One of the law's very objects is finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known." *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991); see also *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect"). Moreover, once a defendant has had the opportunity for appellate review of his or her conviction—including review by the court of appeals for plain error under Rule 52(b)—the courts are "entitled to presume he stands fairly and finally convicted." *Frady*, 456 U.S. at 164. But such considerations do not apply to this case. Olano's convictions are not final.

Thus, this Court has held clearly that the standard of prejudice required to excuse a procedural default on post-conviction review is more exacting "than the showing required to establish plain error on direct appeal." *E.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). The decision in *Frady* v. *United States* is directly on point. In *Frady*, the court of appeals had applied Rule 52(b) in a proceeding under Section 2255 to notice an error that had occurred at the original trial of the defendant. This Court reversed, concluding that "[b]ecause it was intended for use on direct appeal, . . . the 'plain error' standard is out of place when a prisoner launches a

collateral attack against a criminal conviction." 456 U.S. at 164. Instead, a "significantly higher hurdle" must be met": "the 'cause and actual prejudice' standard" of *Davis* and *Wainwright* v. *Sykes*. *Id.* at 166-67. The Court then proceeded to reject Frady's contention that he had suffered "prejudice *per se*" from the district court's error, finding that Frady had not suffered the actual prejudice necessary on post-conviction review. *Id.* at 170-74.

Petitioner now seeks to have this Court ratchet up the standard for plain error review to the level of actual prejudice, a standard that is applied only collaterally. Fundamental fairness and *Frady* require rejection of this argument.[18] This Court has squarely held that it is inappropriate to review a "§ 2255 motion under the same standard as would be used on direct appeal, as though collateral attack and direct review were interchangeable." *Id.* at 165. The actual prejudice standard of *Davis* and *Frady* does not apply to Rule 52(b). The court of appeals properly relied on the inherent prejudice that results from violation of Rule 24(c) in reversing the district court's plain error.

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[18] In essence, what petitioner seeks is a rule that errors such as this one, which are deemed inherently prejudicial because finding specific prejudice is impossible, *see supra* pp. 21-25, can never be noticed as plain error. In other words, petitioner asks this Court to hold that representation by counsel with a conflict of interest, *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978), trial by a biased decisionmaker, *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion), or by a judge or prosecutor with a financial interest in the case, *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 809-14 (1987) (plurality opinion)—all errors that deny a defendant the right to a fair trial yet "whose impact on the trial cannot easily be assessed," Pet. Br. 17—are errors that an appellate court can never correct under the plain error rule. Such a blanket limitation is unwarranted and should be rejected.

b. *Under The Proper Standard, Rule 24(c) Reflects Congress' Judgment That Allowing Alternates To Be Present During Jury Deliberations Is Prejudicial.*

Petitioner likewise is incorrect in asserting that violation of Rule 24(c) will not prejudice defendants. The presence during deliberations of alternates, who do not share with the jury the "awesome responsibility to decide," will stifle free and open discussion among the jurors, the very foundation of the deliberative process. Moreover, it is wholly unrealistic to presume that the alternates sat silent and motionless for the full week the jury deliberated. Even if the alternates did not "participate" in deliberations, it is inevitable that, subtly or unintentionally, they communicated their views to the other jurors.

First, the presence of alternates during jury deliberations "offends 'the cardinal principle that the deliberations of the jury shall remain private and secret in every case.'" Fed. R. Crim. P. 23(b) advisory committee notes to 1983 amendment (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964)). The privacy of jury deliberations is a time-honored and fundamental aspect of trial by jury. "It is a cardinal principle of the jury system that a jury must deliberate in private." *Goby* v. *Wetherill*, 2 K.B. 674, 675 (1915) (Shearman, J.). "When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case . . . ." *People* v. *Knapp*, 3 N.W. 927, 929 (Mich. 1879).

Secrecy and privacy of deliberations ensures full and frank discussion by the jury. *E.g.*, *McDonald* v. *Pless*, 238 U.S. 264, 267-68 (1915). This "discussion and free exchange of ideas" is "the very basis for common judgment among the jurors, upon which the institution of

trial by jury is based." [19] Moreover, free and open deliberation provides a very real protection for the accused: research into jury decisionmaking reveals that, all else equal, the process of deliberation results in the jury's being more lenient toward defendants.[20]

The presence during deliberations of any person who is not a member of the jury inevitably threatens the deliberative process. Indeed, Congress has made it a criminal offense for any person who is not a member of the jury to listen to or observe jury deliberations. 18 U.S.C. § 1508.[21] Section 1508 was enacted during the 1950's in response to breaches in the privacy of the jury room by researchers secretly recording deliberations. Even though the jurors themselves were unaware that their delibera-

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[19] Letter from Deputy Attorney General William P. Rogers to Harley M. Kilgore, Chairman, Senate Comm. on the Judiciary, in support of S.2887, *reprinted in* H.R. Rep. No. 2807, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 4149.

[20] *See, e.g.*, R. MacCoun & N. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. Personality & Social Psych. 21, 29 (1988); G. Stasser *et al.*, *The Social Psychology of Jury Deliberations: Structure, Process, and Product*, in *The Psychology of the Courtroom* 221, 247-51 (N. Kerr & R. Bray eds., 1982); N. Kerr, *Social Transition Schemes: Charting the Group's Road to Agreement*, 41 J. Personality & Social Psych. 684, 691 (1981). The likely explanation for this so-called "leniency effect" is the constitutional requirement that proof in criminal cases must establish guilt beyond a reasonable doubt. MacCoun & Kerr, *supra*, at 30.

[21] Section 1508 provides in relevant part as follows:

> Whoever knowingly and willfully, by any means or device whatsoever—
>
> (a) records, or attempts to record, the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting; or
>
> (b) listens to or observes, or attempts to listen to or observe, the proceedings of any grand or petit jury of which he is not a member in any court of the United States while such jury is deliberating or voting shall be fined not more than $1000 or imprisoned not more than one year, or both.

tions were being recorded, Congress found "no need to belabor the point that such deliberations of the juries should be protected in order to insure the privacy of their actions. The secrecy of jury deliberations . . . should be protected at all times and under all circumstances." H.R. Rep. No. 2807, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 4149, 4150. The public policy favoring complete jury privacy is thus plain and overwhelmingly accepted.

Petitioner agrees that allowing the privacy and secrecy of deliberations to be breached poses the "danger that '[f]reedom of debate might be stifled and independence of thought [might be] checked.'" Pet. Br. 22 (quoting *Clark* v. *United States*, 289 U.S. 1, 13 (1933)). This concession should end the dispute. But petitioner argues, nevertheless, that alternates were not "'strangers' to the jury room whose presence constituted a threat to the sanctity of the jury's deliberations." Pet. Br. 24. According to petitioner, because the alternates were subjected to *voir dire* and sat through the trial not knowing they would later be named alternates, their presence would not "fundamentally alter[] the jury's deliberative process." Pet. Br. 23.

Petitioner's contention, that an alternate "has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror," *id.* (*quoting Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), *cert. denied*, 454 U.S. 867 (1981)), is simply beside the point. Petitioner's assumption that "there is as much reason to assume the alternate jurors favored acquittal as there is to think they favored conviction," Pet. Br. 21—an assumption that is false, as explained below, see *infra* pp. 39-40—has nothing to do with the likely effect on deliberations of their silent presence in the jury room.[22] Someone who is equally

[22] Surely petitioner does not suggest that other neutral participants in the trial, such as the bailiff, the trial judge, or the judge's law clerk, who also would not be "strangers" to the jury at the close of a three-month trial, can freely sit in on deliberations. No doubt they would be as curious about what goes on in the jury room as the alternates—perhaps more so—but that cannot justify turning the jury's deliberations into a spectator event.

familiar with the case, and not disqualified for bias, can nevertheless have an inhibiting effect on deliberations among those vested with the responsibility to decide difficult cases. This Court is well aware of the importance of privacy and secrecy while deliberating, as only the justices themselves are present at conference. No exception is made, for instance, for retired justices to sit in at conference simply because they are not strangers to the process.

Moreover, that alternates are not "strangers" to the jury in the literal sense of the word does not mean that their presence is innocuous. The awkward silence of a friend, if indeed the jurors were on such terms with the alternates, can be even more inhibiting than the expected silence of a stranger. If, over the course of the three-month trial, the jurors grew accustomed to group conversation in which the alternates participated, the forced silence of the alternates could well inhibit discussion by the remainder. Jurors who were used to hearing approval from, or who appreciated confiding in, or who enjoyed disagreeing with those persons who became alternates—concerning subjects from the weather to politics to the NBA playoffs—could now be met with only stony silence and a blank stare when discussions turned to the case at hand, the subject that had occupied their shared attention for three months.

In short, the presence during deliberations of an alternate, "as one not obligated to express an opinion, not committed to the decision that was ultimately reached, not faced with the awful responsibility to decide, could not have gone unnoticed by the 12 formally empaneled jurors and may well have affected their willingness to speak."

State v. Cuzick, 530 P.2d 288, 289-90 (Wash. 1975). Even if the alternates did not participate in deliberations in any manner whatsoever, their very presence with the jury was prejudicial.

Second, it is fanciful to assume that alternates will not communicate their views on the case to the regular jurors, to the prejudice of defendants. " 'It would be understandably difficult for an alternate to remain locked up with regular jurors, perhaps for days, without at some time, during heated discussions, reflecting agreement or disagreement, support or opposition, encouragement or disapproval, praise or derision, hope or frustration, or any of countless other emotions.' " *Commonwealth* v. *Smith*, 531 N.E.2d 556, 560 (Mass. 1988) (quoting *People* v. *Valles*, 593 P.2d 240 (Cal. 1979) (Mosk, J., dissenting)). The picture that petitioner draws of the alternates sitting silent, still, and stone-faced during day after day of extended and sometimes heated deliberations is simply not credible.

Even if the alternates "heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible that [their] attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964) (emphasis in original). Most communication in fact is nonverbal: one authority estimates that less than 10 percent of the communication of feelings is verbal, while over 50 percent results merely from facial expressions. A. Mehrabian, *Nonverbal Communications* 182 (1972).[23] A raised eyebrow, a smile or smirk, a bored sigh, a slow nod or shake of the head, a stifled laugh—

[23] Manuals instructing lawyers on conducting jury trials stress the importance of persuading the jury by means of nonverbal communication. *See, e.g.*, W. Abbott, *Surrogate Juries* § 2.02(b) (1990); S. Hamlin, *What Makes Juries Listen* 423-58 (1985).

any of these could communicate the alternate's views as effectively as actual oral participation in the deliberations.

The procedure followed in this case, whereby the alternates did not learn they would be alternates until the end of trial, only heightens—not lessens, as petitioner asserts, Pet. Br. 23-24—the likelihood of prejudice. As petitioner explains, the alternates were treated identically to the regular jurors for the entire three-month trial and were not even identified as alternates until shortly before retiring to the jury room for deliberations. *Id.* Up until the very end of trial, they expected to participate in those deliberations as regular jurors. Under these circumstances, it is virtually certain that the alternates would succumb to the urge to communicate their views in some way to the jurors.

Petitioner asserts, based on nothing more than its own speculation, that there is no reason to believe that the presence of the alternates in the jury room under these circumstances would be prejudicial to defendants.[24] *Id.* Petitioner is mistaken. Alternates differ from jurors in a vital respect: as petitioner concedes, "alternates are 'not committed to the decision that [is] ultimately reached, [and are] not faced with the awful responsibility to decide." *Id.* at n.9 (quoting *State* v. *Cuzick*, 530 P.2d 288, 289-90 (Wash. 1975)). Because an alternate does not share the all-important sense of responsibility

[24] Petitioner even asserts that actual participation in deliberations by an alternate, contrary to the express instruction of the trial court, would not be prejudicial, Pet. Br. 22, a contention that even those courts of appeals requiring a showing of actual prejudice have rejected. *See United States* v. *Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) ("If the alternate deliberated with the jury on the question of guilt, . . . then reversal and a new trial would be mandatory"); *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973) ("sufficient prejudice and effect on the jury's verdict would be shown and, therefore, a new trial required if the alternate disobeyed the court's instructions and in any way participated in the jury deliberations").

with the jury, he or she necessarily will have a different perspective on the case, which may take less seriously the important protections afforded to defendants by the criminal justice system.[25]

Only a juror who knows that he or she must decide whether to deprive the defendants of their freedom will completely understand the gravity of what is at stake and fully appreciate the importance of reasonable doubt and the presumption of innocence. It is because the jurors are "aware of their responsibility and power over the liberty of the defendant" that in *Johnson* v. *Louisiana*, 406 U.S. 356, 361 (1972), this Court believed majority jurors would continue to deliberate conscientiously even though they had already arrived at a sufficient majority to convict. It is because the jurors are "conscious of the gravity of their task" that this Court presumes they will "strive to understand, make sense of, and follow the instructions given them." *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985). Thus, the courts consistently have held instruction or argument to the jury that tends to lessen its sense of responsibility for its decision to be prejudicial to the defendant. See *Caldwell* v. *Mississippi*, 472 U.S. 320, 333-34 (1985); *United States* v. *Fiorito*, 300 F.2d 424, 426-27 (7th Cir. 1962). Because alternates do not share with the jurors the responsibility that goes with being the ultimate decisionmaker, there is every reason to believe that their presence during deliberations is prejudicial to defendants.

Petitioner also offers as a "common sense proposition" that "[a]ny juror who favors acquittal and is resolute

[25] Petitioner states that the Constitution does not preclude a jury larger than twelve. Pet. Br. 22. This argument is beside the point. The Federal Rules do not authorize a jury of fourteen to sit in criminal cases, and a jury of fourteen did not sit in this case. Instead, a jury of twelve retired for deliberations, with one alternate present for all of deliberations and another present for part. Olano was prejudiced precisely because the alternates did not share with the jurors their responsibility to decide.

enough to resist the facial expressions and gestures of the regular jurors—not to mention their attempts at oral persuasion—would not be swayed in favor of conviction by the expressions or gestures of an alternate." Pet. Br. 24. To the contrary, research into jury decisionmaking makes very clear that one additional expression of support for conviction can make all the difference between a jury that convicts and a jury that acquits. The nature of small group decisionmaking is such that the larger an initial majority, the more likely that majority's position will prevail.[26] Thus, this Court has consistently held that an error affecting even one juror requires reversal, without any inquiry into whether the rest of the jury might have been "resolute enough to resist" that juror's views. See, *e.g.*, *Morgan* v. *Illinois*, 112 S. Ct. 2222, 2229-30 (1992).

Petitioner asserts further that "[j]ust as the alternates are presumed to have followed the instruction not to participate, the regular jurors should be presumed not to have allowed themselves to be influenced by any actions of the alternates." Pet. Br. 4. But the district court did not instruct the regular jurors "not to . . . allow[] themselves to be influenced by any actions of the alternates," to disregard the actions of the alternates, or anything of the sort. Instead, the district court's instruction is directed specifically at the alternates:

> [W]hat we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the

[26] *See, e.g.*, N. Kerr, *supra* note 20, at 690 ("Group members were more likely to join a majority than to defect from one . . ., and this drawing power increases with the size of the majority . . ."); N. Kerr & R. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, 48 J. Personality & Social Psych. 349, 357 table 3 (1985); R. Hastie *et al.*, *Inside The Jury* 106-08 (1983); B. Grofman, *Not Necessarily Twelve and Not Necessarily Unanimous: Evaluating the Impact of* Williams v. Florida *and* Johnson v. Louisiana, in *Psychology and the Law* 149, 162-63 (G. Bermant *et al.* eds., 1976).

> alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate.

J.A. 89-90. Because the jurors were not instructed to disregard the presence of the alternates, or to disregard anything said or done by the alternates, a presumption that the jury followed its instructions does not help petitioner.

Finally, petitioner argues that counsel's consent indicates that there likely was no prejudice in this case. Pet. Br. 25. That argument assumes, however, that counsel's consent is sufficient and that specific prejudice in this case is necessary, assumtpoisn that are unwarranted. See *supra* note 4 & pp. 28-33. Moreover, nothing in the record suggests that counsel's "consent" was calculated on the basis of jury prejudice rather than to appease a judge who clearly did not want to follow the unambiguous dictates of Rule 24.

c. *The Convictions In This Case Were Of Questionable Merit Making The Presence Of The Alternates During Jury Deliberations Likely To Have Affected The Jury's Verdict.*

The correctness of the court of appeals' holding is underscored by the fact that this was a jury that plainly got it wrong. Although it is impossible to determine what effect the alternates had on deliberations in this case, there is every reason to believe that the district court's obvious error "undermined the fairness of the trial and contributed to a miscarriage of justice."[27] *United States* v. *Young*, 470 U.S. 1, 16, n.14 (1985).

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[27] A defendant need not "establish that under the probative evidence he has a colorable claim of factual innocence," *Sawyer* v. *Whitley*, 112 S. Ct. 2514, 2519 (1992) (quoting *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986)), for a court to notice plain error under Rule 52(b). Although this Court has referred interchangeably to the "miscarriage of justice, or 'actual innocence' exception" to rules governing successive petitions and procedural default on post-conviction review, that "narrow" exception applies only in cases in which a prisoner "cannot meet the cause and prejudice standard." *Id.* at 2518-19. Since the cause and actual prejudice standard is demonstrably more exacting than the standard that must be met under the plain error rule, *see supra* pp. 31-33, it cannot be, and petitioner does not contend, that a showing of actual innocence is necessary for Rule 52(b) to apply.

Of greatest significance is the fact that the court of appeals reversed two of the counts on which Olano was convicted and three of the counts on which Gray was convicted for insufficiency of the evidence. Pet. App. 17a, 20a. Petitioner no longer challenges the court's conclusion that no reasonable jury could have convicted respondents on those counts. Pet. 5, n.1. Yet, this jury did.

Moreover, the Government's case against all of the defendants was exceedingly weak. Three of the seven co-defendants at trial were acquitted on all counts by the jury. Two more were convicted on only one count, and that count was reversed on appeal. *United States* v. *Hilling*, 891 F.2d 205 (9th Cir. 1988). As noted, two of the counts on which Olano was convicted and three of the counts on which Gray was convicted were reversed by the court of appeals for insufficient evidence.[28] Their remaining convictions were reversed because of the plain error at issue here, although the court of appeals noted but did not address other "substantial issues" that re-

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[28] Of course, that the court of appeals upheld the sufficiency of the evidence in support of several of the counts, Pet. App. 18a, 22a, does not demonstrate that the Government's case against Olano was strong. It indicates merely that as to those counts, unlike those the court of appeals reversed, there was enough evidence so that a reasonable jury could convict. *See United States* v. *Lane*, 474 U.S. 438, 450 n.13 (1986) ("the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction"); *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946).

spondents had raised concerning the legality of their convictions. Pet. App. 3a, n.3.

Petitioner does not and could not contend that the evidence against Olano and Gray was "overwhelming" or "beyond any doubt," as it was in *Young*. Compare 470 U.S. at 19-20. The court of appeals was fully familiar with the lengthy record in this case, and reversed the district court's error under Rule 52(b). The court of appeals' determination should be upheld.

C. The Government's Desire To Save The Cost Of Retrial Provides No Justification For Ignoring The District Court's Deliberate Violation Of Rule 24 In This Case.

At bottom, petitioner seeks to have this Court redeem the Government's total failure in this purportedly "important prosecution," Pet. 6, on the ground that "[t]he costs of a reversal in this case are huge." Pet. Br. 26. This pursuit of false "judicial economy" should be rejected.

Petitioner exaggerates the costs of a new trial. Any retrial would not require "the investment of three months of trial time by the court, court personnel, the jury, witnesses, and counsel," *id.*, because double jeopardy bars a new trial on much of the Government's case. Moreover, the fact that "five years have passed since the trial" because of the lengthy proceedings before the court of appeals, Pet. Br. 26, cannot fairly be held against Olano, who filed his notice of appeal on September 30, 1987, only five days after he was sentenced. J.A. 7.

In any event, it is the district court and the prosecution that justly bear responsibility for the costs and difficulties of any retrial. The court deliberately and blatantly disregarded the unambiguous requirements of Rule 24(c), by suggesting that the alternates be allowed to be present during deliberations, convincing defense counsel not to object, and ultimately implementing its preferred procedure. Likewise, the prosecutor, whose duty is not

merely to convict but to act in the interests of justice, see *supra* p. 15, had ample opportunity to correct the district court's manifest error at trial and yet failed to do so.

The plain error rule is based on an altogether different premise about the efficient conduct of trials than that offered by petitioner. The plain error rule provides for the review only of an "error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Such errors are best deterred, not by holding the defendant responsible for the inadequacy of his counsel, but by reversing the tainted conviction because of the failing of the district court and the prosecutor. Enforcement of the plain error rule in this case will ensure that a district court "promotes judicial economy," not by convincing counsel to agree to ad hoc modifications of this Court's and Congress' considered judgments about the appropriate procedures to follow at criminal trials, but by adhering to the plain and obvious requirements of the Federal Rules.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

CARTER G. PHILLIPS *
CHRISTOPHER R. DRAHOZAL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Respondent
Guy W. Olano, Jr.

September 1992

* Counsel of Record

(3)

No. 92-[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1306

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents fault the district court for its "flagrant" and "deliberate disregard" (Olano Br. 19, 25) of Federal Rule of Criminal Procedure 24(c), and for its decision to "deviat[e] from the explicit command" (Gray Br. 6) of the rule. Respondents paint a picture of a court that was determined to follow its preferred practice in the face of the plain language of the rule, and they explain the decision by counsel for the seven defendants "to go along" with the court's desires as an effort "to avoid offending the court." Olano Br. 25. Respondent Gray also argues that his counsel "unequivocally" (Gray Br. 4) objected to the suggestion that the alternates accompany the jury, an objection that was later "brushed aside" (Olano Br. 25) by the court.

That is not a fair characterization of what happened at trial. The record makes clear that the district court left the matter of the disposition of the alternates up to counsel. The court prefaced the discussion of the proposal to permit the alternates to remain with the jury during deliberations by saying that "if there is even one person who doesn't like it we won't do it." J.A. 79. The court stated that "unless it's something you all agree to, it's not worth your spending time hassling about." *Ibid.* The court went on to explain that "it's just a suggestion," and stated that it did not want the question whether to permit the alternates to accompany the jury "to be a big issue." *Ibid.* The court then told counsel to "[t]hink about it and let me know." *Ibid.* Rather than portraying a court that needed to be "appease[d]" because it "clearly did not want to follow" (Olano Br. 42) the law, the record demonstrates that the court was flexible on the matter and left to the defendants the decision whether to permit the alternates to remain with the jury. No one called the language of Rule 24(c) to the court's attention, and there is no indication that the court adverted to that language, much less determined to act in defiance of the rule.

The court later returned to the issue, and the following colloquy occurred, J.A. 82:

> THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?
>
> MR. ROBISON [counsel for respondent Gray]: We would ask they not.
>
> THE COURT: Not.

Rather than stating an unequivocal objection to permitting the alternates to accompany the jury, counsel's response to the court's compound question was decidedly ambiguous. The court inquired whether the alternates should "go in and not participate," and counsel responded that he preferred they "not." Although the court did not pursue the matter (and thus did not indicate its interpretation of counsel's response), the response could easily have been interpreted as expressing a preference that the alternates not participate in the deliberations, but not suggesting that they be excluded while the jury was deliberating.

Whatever the meaning of Gray's counsel's response, events on the following day made clear that the defendants, including Gray, did not object to permitting the alternates to observe the deliberations. Referring to an off-the-record discussion, the court noted its understanding that the defendants "all agree that all fourteen deliberate," and sought confirmation of that understanding. J.A. 86. The court specifically asked whether the defendants "want[ed the court] to instruct the two alternates not to participate in deliberation[s]." *Ibid.* Counsel for one of the defendants responded, "[i]t's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations." *Ibid.*

Counsel for Gray, along with counsel for all the other defendants, remained silent as the court confirmed that the defendants "all agree[d]" that the alternates could observe the deliberations. Counsel for all the defendants remained silent when the jury was instructed; their silence continued when the alternates accompanied the jury at the outset of the deliberations and when the jury continued its delib-

erations up to the time of the verdict. No complaints were heard when the jury returned its verdict, or at any time while post-trial motions were pending. Even on appeal, all the defendants except respondent Olano, proceeding *pro se*, remained silent about the issue. Counsel's silence, we submit, suggests either that none believed error had been committed, or that they were satisfied with the choice they had made. Thus, the record demonstrates that respondents not only failed to object to the error, but affirmatively consented to the practice that they now characterize as an egregious violation of their rights.

2. Reviewing courts are properly reluctant to reverse convictions based on claims of error when the defense has "invited" the error by consenting to the procedure followed at trial.[1] Respondent Olano ignores the invited error doctrine altogether, preferring instead to blame the district court for following a pro-

[1] *E.g., United States* v. *Nagi*, 947 F.2d 211, 214 (6th Cir. 1991), cert. denied, 112 S. Ct. 2309 (1992); *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991); *United States* v. *Pungitore*, 910 F.2d 1084, 1143 n.84 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 120 (1990); *United States* v. *Eagle Thunder*, 893 F.2d 950, 953 (8th Cir. 1990); *United States* v. *Rodriquez-Cardenas*, 866 F.2d 390, 395-396 (11th Cir. 1989), cert. denied, 493 U.S. 1069 (1990); *United States* v. *Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); *People of Territory of Guam* v. *Alvarez*, 763 F.2d 1036, 1038 (9th Cir. 1985); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982); *United States* v. *Riebold*, 557 F.2d 697, 708 (10th Cir.), cert. denied, 434 U.S. 860 (1977); *United States* v. *White*, 377 F.2d 908, 911 (4th Cir.), cert. denied, 389 U.S. 884 (1967).

cedure to which his counsel consented. Respondent Gray, on the other hand, cites (Gray Br. 32) three instances in which courts of appeals have failed to invoke the invited error doctrine, and asserts that it therefore "does not matter whether counsel • • • ratified the error or consented to the error." *Ibid.*[2] He does not acknowledge the well-established rule that invited errors cannot serve as the basis for reversal except in the most extreme cases, and he does not suggest that this case is one of the extraordinary ones in which the error is so obvious, and so egregiously prejudicial, that counsel's consent in the trial court should be disregarded.

3. The centerpiece of respondent Olano's argument (Olano Br. 17-33) is his contention that we have misread Fed. R. Crim. P. 52(b), the federal plain error rule. According to Olano, reversal is required under the plain error rule if the district court commits an error that is (1) obvious, and (2) not shown to be harmless within the meaning of the harmless error rule, Fed. R. Crim. P. 52(a).

a. Because an error that is harmless under Rule 52(a) cannot provide the basis for reversal in any event, Olano's argument reduces to the contention that an error is "plain," and thus cognizable in spite of the absence of any objection at trial, if the error can be characterized as "obvious." That approach to plain

[2] All three cases cited by respondent Gray dealt with the definition of willfulness in a jury instruction, an issue that the courts characterized as central to the dispute between the parties. See *United States* v. *Pabisz*, 936 F.2d 80 (2d Cir. 1991); *United States* v. *Aitken*, 755 F.2d 188 (1st Cir. 1985); *United States* v. *Krosky*, 418 F.2d 65 (6th Cir. 1969). By contrast, the procedural issue presented in this case obviously did not bear directly on the central substantive issue at trial.

error is contrary to this Court's decisions; it would lead to pointless disputes about whether an error is obvious or less than obvious (but still error); and it would call for reversal in a number of cases in which defendants, either for tactical reasons or because they regarded the matter as unimportant, have failed to make the contemporaneous objection required by Fed. R. Crim. P. 51.

Contrary to Olano's contention, Rule 52(b) does not mandate relief whenever a court finds an error that is obvious and non-harmless. The rule grants courts the power to review "plain errors or defects affecting substantial rights," even in the absence of an objection, but the Court has made clear that "the power granted [to courts of appeals] by Rule 52(b) is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982); see *United States* v. *Young*, 470 U.S. 1, 17 (1985). As Justice Brennan has observed, "Rule 52(b) permits, rather than directs, the courts to notice plain error; the power to recognize plain error is one that the courts are admonished to exercise cautiously, * * * and resort to only in 'exceptional circumstances,'" *United States* v. *Frady*, 456 U.S. at 180 (Brennan, J., dissenting; citations omitted); 2 Charles Alan Wright, *Federal Practice and Procedure* § 856, at 338 (2d ed. 1982). Following that mandate, the courts of appeals have consistently noted that a non-harmless error under Rule 52(a) is not necessarily a plain error under Rule 52(b), and have instead required "much more" of a showing of prejudice to establish the latter. *United States* v. *Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982); see also

United States v. *McKinney*, 954 F.2d 471, 475-76 (7th Cir. 1992), petition for cert. pending, No. 92-5360; *Government of the Virgin Islands* v. *Smith*, 949 F.2d 677, 682 (3d Cir. 1991); *United States* v. *Lechuga*, 888 F.2d 1472, 1480 (5th Cir. 1989); *United States* v. *Thame*, 846 F.2d 200, 207 (3d Cir.), cert. denied, 488 U.S. 928 (1988); *United States* v. *Acevedo*, 842 F.2d 502, 508 n.1 (1st Cir. 1988); *United States* v. *Dixon*, 562 F.2d 1138, 1143 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978).

To constitute plain error, the error must "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States* v. *Young*, 470 U.S. at 16.[3] In language that directly addresses and answers Olano's argument, the Court has stated:

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[3] Rule 52(b) uses the verb "may" and thus describes a class of cases within which a court is authorized to notice errors to which an objection was not made. Rule 52(a), by contrast, uses the verb "shall" and thus imposes a limitation on the reviewing court's power to notice errors that do not affect substantial rights. As indicated in the statement by Justice Brennan quoted above, this Court has directed that the authority granted by Rule 52(b) is to be exercised only in exceptional circumstances, and normally only when the error has severely prejudiced the defendant in a way that casts doubt on the accuracy of the verdict.

In exceptional cases, plain error can be noted if an error is so grievous that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); see 2 Charles Alan Wright, *supra*, § 856, at 340-341. That application of the rule, however, is reserved for gross departures from proper trial conduct. Permitting two alternate jurors to observe the jury's deliberations can hardly be said to bring federal court proceedings into public disrepute.

> An error, of course, must be more than obvious or readily apparent in order to trigger appellate review under Federal Rule of Criminal Procedure 52(b). * * * '[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Only then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice.

United States v. *Young*, 470 U.S. at 17 n.14; see also *Namet* v. *United States*, 373 U.S. 179, 190 (1963) (plain error rule protects against "obviously prejudicial" errors); *United States* v. *Robinson*, 485 U.S. 25, 36 (1988) (Blackmun, J., concurring in part and dissenting in part) (harmless error analysis requires a "more sensitive prejudice standard" than plain error analysis).

b. While we agree that the district court erred in this case, it is not so clear that the error was "obvious." Although Rule 24(c) provides that the district court shall discharge the alternate jurors at the outset of deliberations, it does not address the question whether the parties can consent to a waiver of that procedure. Olano points to the absence of any reference to consent in the language of the rule and concludes that the rule is therefore "absolute," and that the district court therefore acted in "deliberate disregard" of its "plain and unambiguous terms." Olano Br. 25. The vehemence of Olano's argument on that point seems misplaced, however, in light of his concession elsewhere in his brief that the court of appeals was correct in holding that the requirements of the rule could be waived if a waiver were entered

personally by the defendants, instead of merely by their counsel. Olano Br. 10-11 n.4. If the requirements of the rule can be waived by the personal consent of the parties, even in the absence of a provision for such consent, it is unclear why the requirements of the rule cannot be waived by the parties' consent expressed through counsel. See *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991); Pet. Br. 26-29. There is certainly nothing in Rule 24(c) that would distinguish between those two cases.[4]

c. The procedure employed by the district court in this case did not undermine the integrity of the jury process, as respondents would have the Court believe. Respondents characterize the alternate jurors as "outsiders" to the jury's deliberations, and they urge the Court to treat this case as if the district court had invited two strangers from off the street to participate in the jury's deliberations. But the alternate jurors cannot fairly be regarded as equiva-

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[4] We believe that the rule does not authorize alternates to remain with the deliberating jurors, even if the defendants personally consent to that procedure. A court following the rule therefore should not permit the alternates to remain even if the defendants wish that they be permitted to do so. Of course, if the defendants consent to the procedure and the court allows the alternates to remain with the deliberating jury—as happened here—plain error principles should bar a reversal based on the error.

Olano's argument that the procedure is permissible when defendants personally consent underscores a point we made in our opening brief: that a defendant may perceive it to be in his tactical interest to have the alternates remain with the jury. Olano's argument, if accepted, would retain that option for defendants. But that merely shows why the error of permitting the alternate jurors to remain is not "inherently prejudicial," as Olano elsewhere maintains.

lent to true outsiders whose presence would violate the sanctity of the jury room.

Respondents do not dispute that for most purposes alternate jurors and regular jurors are indistinguishable. They argue, however, that there is one "vital respect" (Olano Br. 39; see also Gray Br. 17-20) in which regular and alternate jurors differ, and that the difference calls for a rule of automatic reversal in every case. According to respondents, because alternate jurors have no part in the decision-making process and do not share moral responsibility for the verdict, their presence necessarily taints the jury's deliberations. In respondents' view, "there is every reason to believe" that the presence of alternates "during deliberations is prejudicial to defendants" because alternates "may take less seriously the important protections afforded * * * by the criminal justice system." Olano Br. 40; Gray Br. 18-20. That argument is based entirely on speculation and finds no support in this Court's cases.

There is no reason to suppose that alternate jurors will make light of the protections afforded to criminal defendants merely because they do not vote on the verdict. Respondents' argument to the contrary ignores not only the shared characteristics of the alternate and regular jurors, but also the fact that the alternates were instructed not to participate in the deliberations. Respondents assert that it is "fanciful" (Olano Br. 38) and inconsistent with "common sense reality" (Gray Br. 16) to assume that the alternate jurors followed that instruction. That assertion, however, is at odds with "the almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987); *Francis* v. *Franklin*, 471 U.S. 307,

325 n.9 (1985).[5] Because the alternates were instructed not to deliberate, and because they shared every relevant characteristic with the regular jurors except their authority to deliberate and vote, it is entirely reasonable to expect that the presence of the alternates would have no effect on the jury's deliberations.[6]

This Court has not justified the need for jury secrecy on the ground that only the 12 regular jurors are responsible for and committed to the verdict that they reach. See Olano Br. 39-40; Gray Br. 20. To the contrary, outside influences on the jury have been condemned by this Court for two reasons: first, that jury exposure to extraneous materials threatens the right to trial by an impartial jury, see *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Turner* v. *Louisiana*,

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[5] There is no reason the defendants could not have sought to determine whether the alternates participated in the jury's deliberations. Federal Rule of Evidence 606 would not bar an inquiry into whether the alternates violated the instruction not to participate in the deliberations. See *Tanner* v. *United States*, 483 U.S. 107 (1987); *State* v. *Meuey*, 476 N.W.2d 846, 853-854 (Neb. 1991) (juror affidavits regarding whether alternates participated in deliberations permissible under state law equivalent to Rule 606). In order to determine whether the alternates followed the instruction not to deliberate, it would not be necessary to inquire into the substance of the jury's deliberations or the jurors' mental processes, subjects that are barred from inquiry by Rule 606.

[6] Respondent Olano also argues that the regular jurors would find the silence of the alternates jarring in light of their prior shared experience. See Olano Br. 37. That seems quite unlikely. The district court explained to all the jurors that the alternates were to play no role in the deliberations. The jury therefore had every reason to expect that the alternates would remain silent during the process.

379 U.S. 466 (1965); and second, that jurors should not have to deliberate in fear "that their arguments and ballots [may] be freely published to the world." *Clark* v. *United States*, 289 U.S. 1, 13 (1933). Neither danger is present in this case.

The presence of alternates does not pose a danger of compromising the impartiality of the jury, because "the alternate who accompanies the regular jurors into deliberations has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror." *Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), cert. denied, 454 U.S. 867 (1981). Nor does the presence of the alternates in the jury room pose an undue danger that the jury's votes and deliberations will be made public. The alternates in this case remained under oath and received the same instructions as the rest of the jury. Moreover, the alternates were selected in the same manner as the rest of the jurors, and all were treated alike during the three months of the trial. There was therefore no reason for the jurors to fear that the alternates would be any more likely to disclose the contents of the deliberations than any other member of the jury.[7]

d. Although respondents have failed to show any specific prejudice as a result of the Rule 24(c) violation that may have led to a miscarriage of justice, they argue that the error was "inherently prejudicial" and should lead to reversal even in the absence of a showing of specific prejudice to their case. That argument, however, overlooks this Court's admonition that "[a] *per se* approach to plain-error review is flawed," *United States* v. *Young*, 470 U.S. at 17 n.14, and that under the plain error standard, prejudice must be assessed on a case-by-case basis.

[7] Because alternate jurors are members of the jury until they are discharged (alternate jurors "shall have the same functions, powers, facilities and privileges as the regular jurors," Fed. R. Crim. P. 24(c)), Olano is incorrect in asserting (Olano Br. 35-36) that the alternates' presence during deliberations violated 18 U.S.C. 1508. If Olano's interpretation were correct, a defendant could not lawfully consent to a waiver of the requirements of Rule 24(c), as Olano argues he may, see Olano Br. 10-11 n.4.

Respondents' "inherent prejudice" argument is based on a fundamental mistake: they suggest that because the procedure they challenge here will "inevitably threaten[] the deliberative process," it must be regarded as prejudicial. Olano Br. 35; Gray Br. 19-20. Even if they are right that permitting the alternate jurors to remain in the jury room is likely to have affected the jury's deliberations, however, it is far from clear that the procedure favored the government. For the reasons set forth in our opening brief (Pet. Br. 21), it is at least equally likely that it favored the defense. Accordingly, there is no reason to assume that any effect of the presence of the alternate jurors during deliberations was necessarily prejudicial to the defendants and should lead to reversal in spite of the defendants' consent.

By invoking the concept of "inherent prejudice," respondents confuse the principles of plain error with those of harmless error. As we argued in our opening brief (Pet. Br. 17-20), an error can be "inherently prejudicial"—*i.e.*, one that can never be harmless—but nonetheless not call for reversal under the plain error standard. A ruling that a certain kind of error is inherently prejudicial—and therefore never harmless—rests on the difficulty of determining whether such an error had an impact on the trial, and

not on the conclusion that the error causes prejudice in every case. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991); *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).[8]

Even if the error in this case were "inherently prejudicial," in the sense that it could never be harmless error, there would be no basis for reversing under the plain error standard. The reason is simple. Respondents' counsel made a tactical decision at trial to permit the alternates to join the jury during deliberations. The record does not reflect the reasons underlying that decision, but several can be posited. Counsel may have concluded that the alternates were favorably disposed toward the defense; counsel may have thought that having a larger number of jurors in the jury room would make a unanimous vote for conviction marginally less likely; or counsel may simply have concluded that the presence of alternates during deliberations was a matter of complete indifference to their case, and they may have agreed to the procedure

[8] Gray's reliance on *Gray* v. *Mississippi*, 481 U.S. 648 (1987), and *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), underscores our point. In those cases the Court held errors affecting the composition of the grand jury or petit jury to be "inherently prejudicial," and thus not subject to harmless error review, because of the difficulty in determining the effect of the errors on the verdict. But the Court did not suggest that those errors would be cognizable in the absence of an objection by the defendant, and in fact lower courts have held that errors affecting the composition of the jury ordinarily do not rise to the level of "plain error." See *United States* v. *Simmons*, 961 F.2d 183, 185 n.1 (11th Cir. 1992); *United States* v. *Anzalone*, 886 F.2d 229, 234 (9th Cir. 1989); *United States* v. *Salamone*, 800 F.2d 1216, 1222 (3d Cir. 1986); *United States* v. *Flores-Elias*, 650 F.2d 1149, 1151 (9th Cir.), cert. denied, 454 U.S. 904 (1981).

for the reason given by the court—as an accommodation to the alternate jurors.[9]

e. Olano argues (Olano Br. 32-33) that our position improperly equates the standard necessary to establish plain error with that necessary to avert a procedural default on collateral review. He contends that the difference in the standards for plain error and collateral attack support his contention that the degree of prejudice necessary to establish plain error is the same as that necessary to establish that an error is not harmless.

The principal difference between the standards applicable to plain error and collateral review is that on collateral review the petitioner must show "cause" for his procedural default, while no such showing is required in the case of plain error. A second difference is that a habeas corpus petitioner seeking to overcome a procedural default must make an even more compelling showing of prejudice than is required to establish plain error on direct appeal. *United States* v. *Frady*, 456 U.S. 152, 166 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

[9] Because there are plausible tactical reasons for the decision to permit alternates to observe the jury deliberations, respondents are incorrect to suggest that the failure to object in this case constituted constitutionally ineffective assistance of counsel. See Olano Br. 15; Gray Br. 4, 28. Moreover, respondents once again make the mistake of equating error with prejudice. Even if the district court's procedure with respect to the alternates was an obvious error, as respondents contend, that does not lead to the conclusion that they were obviously prejudiced by it. This is not a case involving an oversight by counsel; rather, counsel for the defendants considered the question overnight and made a deliberate decision to agree to the procedure. Counsel may well have concluded that having the alternates in the jury room served the defendants' interests at trial, and they may have been right.

As we have noted, the plain error standard normally requires proof that the error in question had "an unfair prejudicial impact" on the trial, *United States* v. *Young*, 470 U.S. at 17 n.14, or "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice," *id.* at 16. To overcome a procedural bar on collateral review, a petitioner must show that the challenged action "infect[ed] [the] entire trial with error of constitutional dimensions," *Murray* v. *Carrier*, 477 U.S. 478, 494 (1986), and resulted in "a fundamentally unjust incarceration," *Engle* v. *Isaac*, 456 U.S. 107, 135 (1982). To be sure, the difference in the two standards may not produce a different outcome in many cases. What is clear from both lines of cases, however, is that the showing of prejudice required under both the "cause and prejudice" standard and the "plain error" standard is greater than the showing needed to establish that a particular error is not harmless under the harmless error rule.

4. Respondents argue that the court of appeals' decision in this case is consistent with decisions of state courts and the lower federal courts. As we demonstrated in our petition (Pet. 7-9), however, the federal courts of appeals have split on the issue presented in this case; in fact, only the Fourth, Ninth, and Tenth Circuits have adopted a rule of automatic reversal such as the one urged by respondents. Moreover, contrary to respondent Gray's suggestion (Gray 16-20), the state courts are far from unanimous in requiring reversal in cases in which alternate jurors accompany the jury during deliberations. To the contrary, many state courts have adopted the approach we urge here, which requires a defendant to show prejudice resulting from the presence of alternates during deliberations. See, *e.g.*, *State* v. *Menuey*, 476 N.W.2d 846 (Neb. 1991); *Luster* v. *State*, 515 So. 2d 1177 (Miss. 1987); *People* v. *Valles*, 593 P.2d 240 (Cal. 1979); *Johnson* v. *State*, 369 N.E.2d 623 (Ind. 1977), cert. denied, 436 U.S. 948 (1978); *People* v. *Rhodes*, 231 N.E.2d 400 (Ill. 1967); *State* v. *Blair*, 516 N.E.2d 240 (Ohio Ct. App. 1986).

5. Respondent Olano takes issue (Olano Br. 44-45) with our argument that the costs of a reversal should be considered in determining whether to excuse a defendant's failure to object at trial. As we have noted, Rule 52(b) permits, but does not require, that plain errors be noticed. In determining whether to notice a plain error, it is entirely appropriate for a reviewing court to consider the costs to the criminal justice system of requiring a new trial in spite of the defendant's failure to object to an erroneous procedure at trial. See *United States* v. *Young*, 470 U.S. at 22 n.1 (Brennan, J., concurring in part and dissenting in part) ("the societal costs of reversing [the] conviction and requiring a retrial" should be considered in plain error analysis); see generally *Morris* v. *Slappy*, 461 U.S. 1, 15 (1983) ("The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources."). Respondents should not be allowed to undo the efforts of the court, the prosecutor, the jurors, and the witnesses throughout a three-month, multi-defendant trial by capitalizing on a procedural error to which they consented.

Respondent Olano (Olano Br. 14-15) is sharply critical of the prosecutor for permitting the error to occur in this case. Under the circumstances, however,

neither the prosecutor nor the district court deserves such criticism. In light of prior Ninth Circuit precedent permitting alternates to accompany the regular jurors in some circumstances (see Pet. App. 25a) and the unanimous consent of the defendants to the procedure used in this case, the prosecutor and the court could reasonably have expected the Ninth Circuit to uphold the procedure, and certainly not to find plain error.

From the perspective of the litigants at trial, the matter of the alternates was a minor housekeeping detail that passed without significant notice; in the district court's words, it was not "a big issue." J.A. 79. Under prior Ninth Circuit precedents, it was far from clear that the district court was committing error at all, much less that the court's error would be found to be so grave as to call for reversal in spite of the defendants' consent. Of course, with perfect hindsight and the leisure of appellate consideration, it is easy now to say that the court and the prosecutor should have avoided the problem in this case by insisting that the alternates be discharged. But it is unfair, we submit, to place principal responsibility for the error on the prosecutor and the court, when the defendants at trial did not suggest that it was in any way objectionable, and in fact unanimously consented to the procedure.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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